# राजपत्र, हिमाचल प्रदेश

## हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

बुधवार, 13 जनवरी, 2016 / 23 पौष, 1937

### हिमाचल प्रदेश सरकार

[*Authoritative English text of this Department Notification No. Home-B-B(I) 1/2016 dated as required under Clause (3) of Article 348 of the Constitution of India.*]

**HOME DEPARTMENT**

NOTIFICATION

*Shimla-2, the 11th January,* 2016

**No. Home-B-B(1)1 / 2016.—**In exercise of the powers conferred by Articles 233, 234 and proviso to Article 309 of the Constitution of India read with sub-section (1) of section 4 of the

Himachal Pradesh Judicial Officers (Pay, Allowances and Conditions of Service) Act, 2003 (Act No. 10 of 2003) and all other powers enabling him in this behalf, the Governor of Himachal Pradesh, in consultation with the High Court of Himachal Pradesh, hereby makes the following rules further to amend the Himachal Pradesh Judicial Service Rules, 2004, notified vide this Department notification No. Home-B(B)2- 4/2002 dated 16th March, 2004 and published in Extra ordinary Gazette, Himachal Pradesh dated 20th March, 2004, namely :—

**1. Short title.—**These rules may be called the Himachal Pradesh Judicial Service (Amendment) Rules, 2016

**2. Amendment of Schedule.—**In the Schedule appended to the Himachal Pradesh Judicial Service Rules, 2004, in Sr. No. 1, under Column No. 3, after entry 10. "Legal Advisor to Lokayukta 01", the following entry shall be inserted, namely:—

" 11. President, District Consumer Disputes Redressal Forum, Una -01", and for the figures "26" appearing against the word "Total" the figures "27" shall be substituted.

By order,
P. C. DHIMAN,
*Additional Chief Secretary.*

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## LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

*Shimla, the 09th December,* 2015

**No: Sharm (A) 6-3/2014 (Awards).—**In exercise of the powers vested under section 17(1) of the Industrial Disputes Act,1947, the Governor Himachal Pradesh is pleased to order the publication of awards of the following cases announced by the Presiding Officer, Labour Court Shimla on the website of the Department of Labour & Employment Government of Himachal Pradesh:—

| Sr. No: | Case No: | Title of the Case | Date of Award |
|---|---|---|---|
| 1. | 31/2011 | Shri Manish Kumar V/s Head Development Alternative Group, New Delhi. | 04-11-2015 |
| 2. | 83/2013 | Shri Gauri Dutt V/S Xen, HPPWD Kumarsain. | 04-11-2015 |
| 3. | 75/2009 | Shri Rakesh Kumar V/s Su-Kum Power System Ltd. Baddi. | 09-11-2015 |
| 4. | 71/2013. | Shri Shyam Singh V/S Registrar Y.S. Parmar University Nauni | 20-11-2015 |
| 5. | 68/2013 | Shri Rajesh Singh V/S -do- | 20-11-2013 |
| 6. | 76/2013 | Shri Ishwar Dyal V/S -do- | 20-11-2013 |
| 7. | 70/2013 | Shri Hem Raj V/S -do- | 20-11-2013 |
| 8. | 69/2013 | Shri Bramba Nand V/S –do- | 20-11-2013 |

| | | | |
|---|---|---|---|
| 9. | 75/2013 | Shri Kishori Lal V/S -do- | 20-11-2015 |
| 10. | 86/2013 | Shri Shamshad Ali V/S Solvopet Shakarpur Sirmour. | 17-11-2015 |
| 11. | 85/2013 | Shri Sanjau Dutt V/S M/S -do- | 17-11-2013 |
| 12. | 01/2012 | Shri Rajesh Kumar V/S M.D. HRTC, Shimla. | 30-11-2015 |
| 13. | 06/2011 | Shri Prem Sing V/S M/S Concept cartonz, Baddi. | 30-11-2015 |
| 14. | 37/2015 | Shri Sanjeev Kumar V/S Secy. Bhojia Dental College, Baddi. | 30-11-2015 |
| 15. | 80/2014 | Shri Sunil Kumar V/S M/S Cyper Pharma, Baddi. | 30-11-2015 |

By order,
Sd/-
*Pr. Secretary ( Lab. & Emp.).*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 31 of 2011
Instituted on : 21.7.2011
Decided on : 4.11.2015

Manish K Prasad R/o Verma Niwas, Flat No.2, Opposite Block No.27, Sector-3, New Shimla, HP. …*Petitioner.*

*Vs.*

1. Development Alternative Group, through its M.D, B-32, Tara Crescent, Qutab Institutional Area, New Dehli.

2. Vice President/Manager, Development Alternative Group, Set No.4, Block-6, Phase-3, New Shimla, HP. …*Respondents.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri Sanjeev Sharma, Advocate.

**For respondents** **:** Already ex-parte.

**AWARD**

The following reference has been sent by the appropriate government for adjudication:

**"Whether Shri Manish Kr. Prasad, Programme Executive, is a workman as per provisions of section 2(s) of the Industrial Disputes Act, 1947? If yes, Whether the termination of the services of Shri Manish Kr. Prasad w.e.f. 30.11.2009, who was employed on contract as Programme Executive, for a period of one year by the Head (HR) Development Alternative Group,, B-32, Tara Cresent Qutab, Institutional Area New Dehli 110016 (ii) The Vice President/Manager, Development Alternative Group,,**

**Set No. 4, Block-6, Phase-3, New Shimla, HP. After completion of three months service without serving notice, without holding enquiry and without following the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not to what back-wages, service benefits and relief Shri Manish Kr. Prasad is entitled to from the concerned management?"**

2. In nutshell, the case of the petitioner is that for the post of Programme Executive, the respondents had conducted the interview on 26th August, 2009 and as per offer letter dated 29th August, 2009, he was selected as Programme Executive with settled terms and conditions and such he joined the respondents company/group on 1st September, 2009 and appointed for a period of one year w.e.f. 1st September, 2009 to 31st August, 2010. It is further stated that the petitioner served the respondents with full sincerity, honesty, devotion and zeal but his services had been terminated on 30.11.2009, illegally without complying the provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). The salary amounting to Rs. 22,000/- for the month of September, 2009 had been given to the petitioner and thereafter no salary had been given to him by the respondents and when he demanded the due salary, his services had been terminated without giving any prior notice and salary to him. It is also stated that neither the payment of earned leave/wages had been paid to the petitioner nor compensation at the time of his termination for which he was legally entitled and the respondents were bound to pay the same to him. Neither any enquiry had been conducted against the petitioner nor any notice and compensation had been given to him. The petitioner is a workman as per the Act as neither he was holding any managerial post nor he was having any decision making power. Due to adamant attitude of the respondents, the conciliation proceedings before the Labour-cum-Conciliation Officer, Shimla had failed. The respondents had not paid earned wages for the months of October & November, 2009 amounting to Rs. 44,000/- and compensation of Rs. 22,000/- before terminating his services which comes to Rs. 66,000/- along-with leave encashment benefits. Against this back-drop a prayer for reinstatement with back wages and all benefits along-with payment of Rs 66,000/- with interest @ 12% per annum and Rs. 50,000/- as damages and Rs. 15,000/- as litigation cost had been made.

3. By filing reply, the respondents have contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, contractual employment and suppression of material facts. On merits, it has been asserted that the petitioner was appointed on contract basis *w .e .f.* 1st September, 2009 to 31st August, 2010, who was on probation for a period of six months from the date of joining. Since, his performance during the probation period was unsatisfactory, the petitioner was given full opportunity to improve his performance and he was warned several times but his performance had not improved, hence, as per terms and conditions of the contract, his contract during the probation period had been terminated. It is further asserted that the salary for the month of September, October and November, 2009 had been paid to the petitioner vide cheque no. 719296 dated 9.10.2009, cehque no. 619114 dated 3.11.2009 and cheque no. 652714 dated 12.12.2009 and all the payments had been credited in his saving account and no other amount was due. No departmental enquiry is required to be conducted in case of termination during probation period. Since, the petitioner was appointed in the officer cadre on payment of consolidated fee of Rs. 22,000/- per month, therefore, he cannot be termed as a workman. The respondents prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Pleadings of the parties give rise to the following issues which were struck on 27.2.2013.

1. Whether the petitioner is a workman as per provisions of section 2(s) of the Industrial Disputes Act, 1947? ...*OPP.*

2. Whether the termination of the services of the petitioner w.e.f. 30.11.2009, by the respondents is in violation of the provisions of Industrial Disputes Act, 1947? ...*OPP.*

3. If issue no.1 & 2 are proved in affirmative to what benefits & relief the petitioner is entitled to? ...*OPP.*

4. Whether this petition is not maintainable? ...*OPR.*

5. Relief.

5. The respondents have filed written arguments on 9.7.2014. Besides having heard the Learned counsel for the petitioner, I have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no.1 | Yes. |
| Issue no. 2 | No. |
| Issue no. 3 | Not entitled to any relief. |
| Issue no. 4 | No. |
| Relief. | Reference answered in favour of the respondents and against the petitioner, per operative part of order. |

REASONS FOR FINDINGS

**Issue no. 1.**

7. Before, I proceed further, it is relevant to point-out here that vide order dated 23.9.2015, the respondents were proceeded against ex-parte.

8. The learned counsel for the petitioner contended that on 1st September, 2009, the petitioner had been appointed as Programme Executive on a monthly salary of Rs, 22,000/- for the period of one year but his services had been terminated on 30.11.2009 without assigning any reason and without complying the mandatory provisions of the Act. He further contended that though the petitioner had been appointed as Programme Executive but neither he was holding any managerial post nor any subordinates had been working under him, hence, he falls under the category of workman as per section 2(s) of the Act.

9. On the other hand the case of the respondents is that since the petitioner was engaged as Programme Executive, hence, he does not fall under the category of a workman as defined in section 2 (s) of the Act, who had been appointed for a period of one year but due to unsatisfactory work of the petitioner, during probation, his services had been terminated on 30.11.2009 as per terms and conditions of his appointment letter.

10. To prove his case, the petitioner examined himself as PW-1, who has stated that on the basis of interview held on 26.8.2009, he was employed by the respondents company as Programme Executive at Shimla Office and in this regard appointment letter had been issued to him according

to which he had to work w.e.f. 1.9.2009 to 31.10.2010 on the monthly salary of Rs. 22,000/-. He worked continuously till 30.11.2009 with the respondent company without any break on which date his services had been terminated illegally without any notice by an oral order. He had been paid the salary for the month of September, 2009 only and thereafter when he demanded his salary he was terminated from service. The copy of demand notice is Ex. PW-1/A. No enquiry had been conducted against him. At the time of his termination, the work was available with the respondent company. His colleagues are still working with the respondent company. His status in the company was that of a workman.

11. Conversely, Shri M. K. Aeri, Head HR has appeared into the witness box as RW-1, and tendered his affidavit Ex. PW-1/A in evidence wherein it has been stated that the petitioner had been appointed as Programme Executive on contract basis on 1st September, 2009 for a period of one year on consolidated fee of Rs. 22,000/- per month in the executive cadre, who was on probation for a period of six months. The performance of the petitioner was not satisfactory during the period of probation and he was given full opportunity to improve his performance by repeated e-mails and personal discussion but he did not improve his performance. Thereafter, it was decided to remove him from service in terms of his appointment and as per the direction of Ms. Kiran Sharma, a termination letter dated 30.11.2009 had been issued to the petitioner. The salary for the months of September, October and November, 2009 vide cheque no. 719296 dated 9.10.2009, cehque no. 619114 dated 3.11.2009 and cheque no. 652714 dated 12.12.2009 and all the payments had been credited in his saving account and no other amount was due. He also tendered the appointment letter of the petitioner Ex. RW-1/B and termination letter Ex. RW-1/C. In the crossexamination, he stated that the respondents company is a society and is duly registered as per Societies Act. He has denied that the salary for the months of October and November, 2009, had not been paid to the petitioner. He also denied that the petitioner was not holding any managerial post.

12. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was appointed as Programme Executive vide appointment letter dated 1st September, 2009 on contract basis for a period of one year. The plea which has been taken by the petitioner is to this effect that since he was not performing any managerial work, his case falls under the category of workman as prescribed in section 2 (s) of the Act. Now, this Court is required to ascertain as to whether the petitioner falls within the category of workman or not as per section 2 (s) of the Act. At this juncture, it would be relevant to re-produce section 2 (s) of the Act, which reads as under “workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, dischasrge or retrenchment has led to that dispute, but does not include any such person:

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

13. It is a settled provision of law that in determining as to whether a person is a workman or not, the Court has to principally see the main or substantial work for which he was employed. Neither the designation nor any incidental work done by him will get him out-side the preview of the Act. **The Hon'ble Supreme Court in (1994) 5 S.C.C 737, titled as H.R Adyanthaya and others Vs. Sandoz (India) Ltd., and another** has held that for an employee to be covered by the definition of workman he must be employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work. If he falls within these categories, it has then to be seen whether he comes within any of the four excluded categories mentioned in section 2 (s) of the Act. The relevant portion of the aforesaid judgment reads as under:

> 24……. Hence, the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions of the definition. We reiterate the said interpretation."

14. **In case reported in 2006-III LLJ (767) titled as Anand regional Co.op. Oil Seedsgrowers Union Ltd. Vs. Shailesh Kumar Harshad Bhai Shah**, the Hon'ble Supreme Court has observed as under:

> "For determining the question as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations"
>
> "Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration. An undue importance need not be given for the designation of an employee, or the name assigned to the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised. Being incharge of section alone and that too it being a small one and relating to quality control would not answer the test."

15. Therefore, the ratio of the aforesaid decisions makes it clear that for determining the question as to whether a person employed in an industry is a workman or not, the nature of the work performed by him is the main determining factor and his designation is immaterial. In the present case, the plea of the petitioner is that he was appointed as a Programme Executive vide appointment letter dated 1.9.2009, Ex. RW-1/B. In his statement as PW-1 also he deposed that he had been working in the capacity of a workman. However, the respondent had failed to cross-examine the petitioner on this aspect, therefore, it can reasonably be infered that the respondent admitted this aspect of the matter. Moreover, no material pertaining to the nature of duties of the petitioner has been brought on record by the respondent which could have shown the nature of work being performed by the petitioner. Hence, in the absence of any evidence on record and cross-examination of petitioner (PW-1) on behalf of respondent, it can safely be held that the petitioner was not performing managerial functions with the respondent and as such he can be said to be a workman as defined under section 2 (s) of the Act. Accordingly this issue is answered in favour of the petitioner and against the respondents.

**Issue no. 2**

16. It is the admitted case of the parties that the petitioner was appointed by the respondent as Programme Executive on contract basis as per appointment letter Ex. RW-1/B for a period of

one year commencing from 1st September, 2999 to 31st August, 2010, on certain terms and conditions. It is also not disputed that the services of the petitioner were terminated on 30.11.2009. In the appointment letter Ex. RW-1/B, it has been clearly mentioned that the duration of consultancy commences from 1st September, 2009 and terminates on 31st August, 2010, unless otherwise extended or terminated by either side. It has come on record in the evidence of the respondent that since the performance of the petitioner was not satisfactory during the period of probation, who was given full opportunity to improve his performance by repeated e-mails and personal discussion but he did not improve his performance, hence, his services had been terminated in accordance with appointment letter Ex. RW-1/B. No doubt, the petitioner has tried to establish that he was terminated in contravention of the provisions of the Act but when regard is given to his appointment letter Ex. RW-1/B, it has been clearly mentioned therein that the appointment is initially provisional for a period of six months from the date of joining while on probation and during the period of probation either side could terminate the services without assigning any reason. In ***Escorts Ltd. Vs. Presiding Officer & another reported in (1997) 11 SCC 521***, it has been held by the Hon'ble Apex Court that where the terms of appointment enable the employer to terminate the services at any stage, in such circumstances, termination of services even though effected before the expiry of the specified period did not amount to retrenchment. The relevant portion of the aforesaid judgment is reproduced as under:

> "4……Here also the services of the workman were terminated on 13.2.1987, as per the terms of the contract of employment contained in the appointment letter dated 9.1.1987 which enabled the appellant to terminate the services of the workman at any stage without assigning any reason. Since the services of the workman were terminated as per the terms of the contract of employment, it does not amount to retrenchment under section 2(oo) of the Act and the Labour Court was in error in holding that it constituted retrenchment and was protected by sections 25-F and 25-G of the Act."

17. In the present case also the services of the petitioner were terminated on 13.11.2009 as per the terms of appointment mentioned in the appointment letter Ex. RW-1/B which enabled the respondent to terminate the services of the petitioner during the period of probation without assigning any reason. Since, the services of the petitioner had been terminated as per the terms of the appointment, it does not constitute retrenchment in view of the clause (bb) of section 2(oo) of the Act. Thus, keeping in view the law laid down (supra) and the entire evidence on record, the petitioner has failed to prove that his termination w.e.f. 30.11.2009, is in violation of the provisions of the Act. Hence, this issue is answered in negative.

**Issue no. 3.**

18. Since, I have held under issue no.2, above, that the petitioner has failed to prove that his termination is in violation of the provisions of the Act, hence, this issue becomes redundant.

**Issue no. 4.**

19. The petitioner has filed the present claim petition consequent upon the reference having been sent by the appropriate government for adjudication to this Court. But, in support of this issue, no evidence was led by the respondent. However, I find nothing wrong with this petition which is perfectly maintainable. Hence, this issue is decided in favour of the petitioner and against the respondent.

***Relief***

As a sequel to my findings on the aforesaid issues, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour

of the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open Court today on this 4th Day of November, 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P)**

Ref. No. : 83 of 2013.
Instituted on. : 11.11.2013.
Decided on : 4.11.2015.

Gauri Dutt S/o late Shri Mast Ram, R/o Village Chhabaldi, P.O Gumma Tehsil & District Shimla, HP. *...Petitioner.*

*Vs.*

The Executive Engineer, HPPWD Division, Kumarsain, District Shimla, HP.
*…Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri Naresh Sharma, Advocate.
**For respondent :** Shri Jagdish Rajta, ADA.

**AWARD**

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Gauri Dutt S/o late Shri Mast Ram R/o Village Chhabaldi, P.O Gumma, TEhsil & District Shimla during April, 1991 by the Executive Engineer, HPPWD Division Kumarsain District Shimla without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that he was appointed as beldar/chowkidar on daily wages basis with the respondent w.e.f. 1.1.1983 till December, 1992 thereafter his services had been orally terminated without serving any prior notice as required under law. The petitioner worked at various places under the respondent. It is further stated that the petitioner was not in his good health since 11th April, 1992 and was undergoing treatment in the IGMC and his wife was also in ailing condition and there was no one at home to look-after the patients. The petitioner had completed 240 days in twelve calendar months and even in preceding to the date of his oral and illegal termination. It is also stated that the petitioner had unblemished record of service, who never

gave any opportunity of complaint. The petitioner made several requests seeking re-employment by visiting the office of the respondent number of times but in turn he was assured that as and when his services would be required, he should be called but the respondent chose not to offer employment to him and even, many juniors namely Durga Nand, Mela Ram, Prem Chand, Sant Ram etc. had been retained in service by the respondent. No compensation had been given to the petitioner and due to ailment, the petitioner could not attend the department for work for which period medical certificates were submitted by him to the respondent. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections had been taken qua bared by time, maintainability, estoppel, abandonment and that the claim petition is bad in the eyes of law. On merits, it has been asserted that initially the petitioner was engaged as daily wages beldar *w.e.f.* 1.7.1983 by the Executive Engineer, Shimla Division No. II and completed only 121 days in the year, 1983. The petitioner had worked continuously having more than 240 days in each year except in the years, 1983 and 1991. The services of the petitioner had not been terminated by the respondent, who himself had abandoned the job after March, 1991. It is further asserted that the petitioner had never intimated the respondent department about his illness and treatment in IGMC, Shimla. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties give rise to the following issues which were struck on 18.7.2014.

1. Whether the termination of the services of the petitioner is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? ...*OPP.*

3. Whether this petition is not maintainable as alleged in preliminary objections no. 2 & 4? ...*OPR.*

4. Whether the petitioner is estopped from filing this petition by his own act and conduct? ...*OPR.*

5. Relief.

6. Besides having heard the Learned counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no. 2 Not entitled to any relief.

Issue no. 3 Yes.

Issue no. 4 No.

Relief. Reference answered in favour of the respondent and against the petitioner per operative part of award.

REASONS FOR FINDINGS

***Issue no. 1&3.***

8. Being interlinked and correlated, both these issues are taken up for discussion and decision.

9. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act and even juniors to him are still working with the respondent. He further contended that on account of illness of the petitioner and his wife, he was unable to attend the office of the respondent.

10. On the other hand, Ld. ADA for respondent contended that the services of the petitioner had never been terminated by the respondent department, who himself abandoned his job without any intimation. He further contended that the petitioner had not come for work after March, 1991 and raised the industrial dispute on 2.1.2013, after a gap of more than twenty one years, hence, the claim of the petitioner is liable to be dismissed.

11. To prove his case, the petitioner has appeared into the witness box as PW-1 and tendered his affidavit Ex. PW-1/A in examination-in-chief wherein he has reiterated all the material facts as stated in the claim petition. He also tendered in evidence documents Ex. PW-1/A, C-1 to Ex. PW-1/A, C-58. In the cross-examination, he denied that he was engaged in the month of July, 1983 as daily waged beldar but stated that he was engaged in the month of Jan., 1983. He denied that he had abandoned his job at his own without any intimation to the department in March, 1991. He denied that Junior Engineer, HPPWD Baldehan had sent a letter dated 31.5.1991 through registered post for calling him to join the duties. He admitted that he served demand notice on the respondent on 2.1.2013 after the lapse of twenty one years. He denied that he had not completed 240 days in the year, 1983 and 1991, when he left the job at his own. He also denied that regarding his illness, he had not informed the department.

12. In rebuttal, the respondent has examined two witnesses. RW-1 Shri Narender Kumar, Junior Engineer, has brought the original record pertaining to this case. Ex. RW-1/A is the copy of muster roll w.e.f. 1.4.1991 to 31.5.1991 and Ex. RW-1/B is the copy of letter dated 31.5.1991. The copy of postal receipt is Ex. RW-1/C and the detail of mandays chart of the petitioner is Ex. RW-1/D.

13. RW-2 Shri H.S Mehta, has stated that the petitioner was engaged as beldar on 1.7.1983 and thereafter on 1.4.1991, the petitioner had left the job on his own. Muster roll for the months of April & May had been issued but the petitioner had not joined the service. Then a letter Ex, RW-1/B to resume the duties had been issued to the petitioner through registered post Ex, RW-1/D but of no avail. The petitioner never approached the respondent for his re-engagement. No medical certificate had been submitted by the petitioner, whose services had not been terminated by the respondent. In cross-examination, he stated that he had worked as Junior Engineer with the respondent for the year, 1986 to 1997. He denied that the services of the petitioner had been terminated orally. He also denied that the petitioner had informed the department that he himself

and his wife was not keeping good health. He further denied that the petitioner had approached for his reengagement several times. He admitted that the petitioner had completed 240 days in each year except the years, 1983 and 1991. He also admitted that junior persons to the petitioner had been retained by the department.

14. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that the petitioner was engaged as beldar on daily wages by the respondent in the month of July, 1983 as per mandays chart Ex. RP-1 and worked as such till March, 1991 which fact is clear from year wise detail of working days Ex. RP-2. No doubt, the petitioner has stated as PW-1 that he was engaged as daily wages beldar in the month of Jan., 1983 but in support of his such version he has not filed any document on record which could go to show that he was engaged in the month of Jan., 1983. No record, in this regard was summoned by the petitioner from the respondent in order to prove the actual date of engagement of the petitioner, therefore, I have no other option but to hold that the services of the petitioner had been engaged by the respondent in the month of July, 1983.

15. Now adverting to the other aspects of the case, the petitioner has categorically stated as PW-1 that his services had been terminated by the respondent in an illegal manner without following the mandatory provisions of the Act. The petitioner further stated that since he had fallen ill on 11.4.1992 and was undergoing treatment in IGMC and during this period his wife also fell ill and there was no one at home to look-after them, for this reason, he could not attend the departmental work. In support of his such version, he has placed on record the prescription slips along-with some laboratory test receipts and photocopies of x-ray forms, Ex. PW-1/A C-1 to Ex. PW-1/A C-58. No doubt that the petitioner has tried to establish on record that since he alongwith his wife were not keeping good health, he was unable to attend the office but in support of his such version, no material has been placed on record by the petitioner which could go to show that he or his wife remained ill in continuity and were advised rest by the Doctor. On the other hand, the respondent has placed on record one registered letter Ex. RW-1/B along-with postal receipt Ex. RW-1/C which shows that the petitioner was called to resume his duties but the petitioner failed to report for his duties. The respondent has also placed on record the mandays chart Ex. RP-1 and year wise detail of working days of petitioner Ex. RP-2. The mandays chart Ex. RP-1 also makes it clear that after 31.3.1991, muster rolls had been issued in the name of the petitioner but he himself had failed to report for duties. Had the services of the petitioner been terminated by the respondent, there was no occasion for the issuance of muster rolls for the months of April, May and June, 1991. The learned counsel for the petitioner contended that neither any notice was issued to the petitioner by the respondent for his alleged willful absence from duties nor any enquiry was held, therefore, it cannot be said that the petitioner had abandoned his job and as such the termination of the services of the petitioner is in violation of the provisions of the Act. However, I am not inclined to accept this contention of the learned counsel for the petitioner in view of the overwhelming evidence on record which goes to show that the services of the petitioner had not been terminated by the respondent rather he himself had abandoned his job. It has been held by the **Hon'ble Apex Court in (2013) 10 Supreme Court Cases 253 titled as Vijay S. Sathaye Vs. Indian Airlines Limited and Ors**. that absence from duty in the beginning may be a mis-conduct but when absence is for a very long period, it may amount to voluntary abandonment of service. The relevant paras 12 to 14 are reproduced as under:

> "12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily

abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer."

"13. In Jeewanlal (1929) Ltd., Calcutta v. Its Workmen, this Court held as under (AIR p. 1570 para 6):

> ".....there would be the class of cases where long unauthorized absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

(See also: Shahoodul Haque v. The Registrar, Co-operative Societies,

"14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as 'retrenchment' from service. (See: State of Haryana v. Om Prakash)"

16. In the instant case also as observed earlier when the respondent had issued registered letter Ex. RW-1/B to the petitioner to resume his duties and also issued muster rolls for the months of April, May and June, 1991 but despite that the petitioner had not joined the same, his such conduct clearly speaks that he himself had abandoned his job and his case would not fall within the definition of retrenchment as such there is no question of violation of any provision of the Act.

17. Moreover, it is the admitted case of the petitioner that he had raised the industrial dispute on 2.1.2013, after a lapse of about twenty one years meaning thereby that he remained silent for more than twenty one years. **In (2013) 14 SCC 543, titled as Assistant Engineer Rajasthan State Agriculture Marketing Board, Sub Division Kota Vs. Mohan Lal**, it has been held by the Hon'ble Apex Court that though the Limitation Act is not applicable to the reference made under the I.D Act but delay in raising industrial Dispute is an important circumstance for exercise of judicial discretion in determining relief that is to be granted. The relevant portion of aforesaid judgment is reproduced as under:

> "19. We are clearly of the view that though the Limitation Act, 1963 is not applicable to the reference made under the ID Act but delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side. The legal position laid down by this Court in Gitam Singh that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute, must be invariably followed.**"**

18. In the instant case also admittedly the petitioner had raised the industrial dispute after lapse of about twenty one years and remained silent during this period without any plausible explanation, as such, no relief can be granted to him as the evidence on record clearly shows that he himself had abandoned his job. Hence, it cannot be said that the termination of the services of the petitioner is illegal and unjustified. Consequently, these issues are answered accordingly.

***Issue no. 2.***

19. Since, the petitioner has failed to prove issue no.1, this issue become redundant.

***Issue No. 4.***

20. In support of this issue, no evidence was led by the respondent which could go to show that the petitioner was estopped from filing this petition by his own act and conduct. Hence, this issue is decided in favour of the petitioner and against the respondent.

***Relief***

As a sequel to my findings on the aforesaid issues, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour of the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open Court today on this 4th Day of November, 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 75 of 2009.
Instituted on : 17.8.2009.
Decided on : 9.11.2015.

1. Rakesh Kumar S/o Shri Tek Chand
2. Rajesh Kumar S/o Shri Prema Ram.
3. Rajeev Kumar S/o Shri Lek Ram.
4. Sunil Kumar S/o Shri Ram Singh.
5. Sanjeev Kumar S/o Shri Lekh Ram
6. Sanjay Thakur S/o Shri Ram Ditta Gupta.

All working under the Managing Director, M/s Su-Kam Power System Ltd., 64, 71 DIC Industrial Area Baddi, Tehsil Nalagarh, District Solan, HP. ...*Petitioners.*

*Vs.*

The Managing Director, M/s Su-Kam Power System Ltd., 64, 71 DIC Industrial Area Baddi, Tehsil Nalagarh, District Solan, HP. ...*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Smt. Nishi Goel along-withShri Rakesh Thakur, Advocate.

**For respondent :** Shri Rahul Mahajan, Advocate.

**AWARD**

The following reference has been sent by the appropriate government for adjudication:

1. **"Whether the transfer of S/Shri Sanjeev Kumar, Rajeev Kumar, Sanjay Thakur, Sunil Kumar & Rakesh Kumar to different branches of M/s Su-Kam Power Systems Limited at Gurgaon, Dehli, Jaipur and suspension of Shri Rajesh Kumar and thereafter dismissal of workman S/Shri Sanjeev Kumar, Rajeev Kumar, Sanjay Thakur, Sunil Kumar & Rakesh Kumar from service on 30.4.2009 alongwith suspended workman Shri Rajesh Kumar on the ground of major misconduct by the management, as alleged by the management of M/s Su-Kam Power System Ltd., 64, 71 DIC Industrial Area Baddi, Tehsil Nalagarh, District Solan, HP. Is legal and justified? If not, what relief and consequential service benefits above workmen are entitled to?"**

2. **"Whether strike resorted by the workmen of M/s Su-Kam Power System Ltd., 64, 71 DIC Industrial Area Baddi, Tehsil Nalagarh, District Solan, HP w.e.f. 28.7.2009 against the transfer/suspension and further dismissal of S/Shri Sanjeev Kumar, Rajeev Kumar, Sanjay Thakur, Sunil Kumar, Rakesh Kumar & Rajesh Kumar is legal or illegal and its effect?"**

2. In nutshell, the case of the petitioners is that they joined the services with the respondent industry on different dates as mentioned in Annexure A-1. The Managing Director, under mistaken notion and ignorance of the law, terminated the services of the petitioners from the dates as mentioned in chart Annexure A-1 as no notice under section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred as to Act) was served on the petitioners. Juniors namely S/Shri Jai Kumar, Tarsem, Des Raj, Rajinder Kumar, Vinay and Hakam had been retained by the respondent. All the petitioners have completed 240 days in every calendar year. It is further stated that the respondent company deliberately harassed the petitioners and to this effect complaints dated 28.7.2009, 31.7.2009, 17.8.2009 and 19.8.2009 have been written by them to different authorities. The workers of the company were sitting out-side the factory gate and demonstrating their agitation peacefully to fulfill their demands but the respondent deliberately harassed the workers and they were transferred to other different places. No transfer orders have been served and the services of the petitioners had been terminated without giving opportunity of being heard to them. No appointment letters have been issued to the petitioners by the respondent at the time of their appointment in the company and they had been transferred out-side the State with malafide intentions. The conciliation proceedings were failed due to adamant attitude of the respondent. It is also stated that without conducting any fair enquiry against the petitioners, their services have been dispensed with and that no proper opportunity of being heard was afforded to them. The petitioners have no other source of income to support their large family. Against this back-drop a prayer for their reinstatement with all consequential benefits and seniority has been made.

3. The respondent has filed the reply on 1.7.2010 but on 7.6.2013 and application under order 6 rule 17 CPC for amendment of reply has been filed by the respondent which was allowed vide order dated 4.6.2014. By filing amended reply the respondent has taken various preliminary objections including that the statement of claim is liable to be rejected for lack of proper pleading by the petitioners, the reference is bad in law and the petitioners are gainfully employed. On merits, it has been asserted that the petitioners S/Shri Rakesh Kumar, Rajesh Kumar, Rajeev Kumar, Sunil Kumar, Sanjay Kumar and Sanjay Thakur had joined the respondent company on 1.8.2006, 1.3.2007, 1.6.2005, 17.12.2003, 1.3.2006 and 1.3.2007 respectively. The petitioners have indulged in grave acts of bad behavior and gone to the height of transgression that is not at all expected from

any industrial workman. The acts of misconduct ranges from insubordination, manhandling security personnel and reporting supervisors, open intimidation to staff, misbehaving and riotous conduct, holding dharna and demonstration, sitting besiege of factory compound, inciting other workers to proceed on strike, causing obstruction and hampering production and as such the services of the petitioners were terminated. Since, it is not a case of retrenchment, there is no legal requirement for compliance under section 25-F of the Act and the retention of juniors is also not relevant being not a case of retrenchment. The petitioners were duly served with the notice of their termination from the company along-with one month's salary and other dues on their prescribed addresses. It is further asserted that petitioner Rakesh Kumar after refusing to receive his transfer order started indulging in disruptive activities along-with other petitioners and few out-siders and incited other workers to proceed on strike, which started from 27.7.2009 and continued till 13.8.2009, when the strike was prohibited. During the strike, the petitioner and his accomplices led violent agitation ranging from threatening staff, shouting filthy slogans, hurling foul abused and manhandling fellow workmen. The petitioner Rakesh Kumar was transferred to Gurgaon vide transfer order dated 23.7.2009 which was refused to receive by the petitioner and as such the transfer order had been sent through registered post at this available address. The services of the petitione rs had been dismissed for major misconduct vide detailed order dated 30.7.2009 without conducting a domestic enquiry due to atmosphere of fear and tension having been created by the petitioners. It is also asserted that the petitioners are gainfully employed having good source of income. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder to the amended reply, the petitioners reaffirmed the allegations by denying those of the respondent.

5. Pleadings of the parties give rise to the following issues which were struck on 4.9.2010 and 7.1.2015.

6. Whether the transfer of petitioners S/Shri Sanjeev Kumar, Rajiv Kumar, Sanjay Thakur, Sunil Kumar & Rakesh Kumar to different branches of respondent company was illegal and unjustified as alleged? ...*OPP*.

7. Whether petitioner Rajesh Kumar was put under suspension in an illegal and unjustified manner as alleged? ...*OPP*.

8. Whether petitioners S/Shri Sanjeev Kumar, Rajiv Kumar, Sanjay Thakur, Sunil Kumar, Rakesh Kumar along-with suspended workman Shri Rajesh Kumar were dismissed on the ground of major misconduct by the respondent in illegal and unjustified manner as alleged?

...*OPP*.

9. To what relief, the petitioners are entitled to if all or any of the above issues stand proved? . . .*OPP*.

10. Whether the strike resorted by the workmen of respondent company against the transfer/suspension and further dismissal of petitioners S/Shri Sanjeev Kumar, Rajiv Kumar, Sanjay Thakur, Sunil Kumar, Rakesh Kumar and Rajesh Kumar was legal as alleged? If so, its effect?

5-A. Whether the respondent is entitled to lead evidence on merits before this Court to prove the misconduct of the petitioners in case their dismissal is found to be in violation of the principles of natural justice? . . .*OPR*.

11. Relief.

6. The parties have led their evidence in support of the aforesaid issues.

7. To support their case, all the petitioners have stepped into the witness box. Petitioner Shri Sunil Kumar has appeared into the witness box as PW-1 and tendered his affidavit, Ex. PW-1/A in examination-in-chief wherein he has stated that he was given appointment by the respondent in December, 2003 as helper and worked till July, 2009 on monthly salary of Rs. 4500/- along-with other benefits. He performed his duties to the satisfaction of the employer as helper/Sr. fitter without any complaint till his illegal retrenchment. He had competed 240 days in a year and the preceding year. His juniors namely S/Shri Jai Kumar, Hakam Singh, Tarsem Kumar and Sanjeev Kumar had been retained by the respondent company. Neither any notice had been issued to him nor any enquiry had been conducted. He requested for his reengagement but of no avail. Since, he was illegally retrenched by the respondent, hence, he is entitled to all consequential benefits including back–wages etc. In cross-examination, he admitted that the chargesheet Ex. PR-1 dated 7.7.2009 had been issued to him by the respondent. He also admitted that vide Ex. PR-2, he replied the chargesheet. He denied that he refused to receive show cause notices dated 17.6.2009 and 23.6.2009. He admitted that vide letter dated 23.7.2009, Ex. PR-3, he was transferred from Baddi. He also admitted that he had not joined his new place of posting. He denied that on 27.7.2009 he along-with other petitioners had formed a group and threatened the security guards, Sanjay Kumar, Ramesh and Parvinder. He denied that on 28.7.2009 and 29.7.2009, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He admitted that the respondent had filed a suit for injunction against him and other petitioners in the Court of Ld. Civil Judge, Sr. Division Nalagarh, the copy of which is Ex. PR-7. He expressed his ignorance that Pankaj Jha and Ajay Pandey were also transferred, along-with him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

8. PW-2 Shri Sanjeev Kumar tendered his affidavit Ex. PW-2/A in examination-in-chief wherein he stated that he was given appointment by the respondent in March, 2005 as helper on monthly salary of Rs. 5,200/- and worked as such till July, 2009. In the crossexamination, he denied that the respondent had issued chargesheet Ex. PW-2/B dated 7.7.2009 to him. He further denied that show cause notice Ex. PW-2/C dated 17.6.2009 regarding less production and wrongful rejection inventor pieces, had been issued to him. He admitted that vide letter Ex. PW-2/D dated 10.7.2009, he had filed reply to chargesheet and show cause notice. He denied that show cause notice Ex. PW-2/E dated 24.6.2009 for remaining absent from duties had been received by him. He admitted that he was transferred from Baddi vide letter dated 23.7.2009, Ex. PW-2/F. He also admitted that letter Ex. PW-2/D had been written by him in his hand. He further admitted that he had not joined his new place of posting. He denied that on 27.7.2009 he along-with other petitioners had formed a group and threatened the security guards, Sanjay Kumar, Ramesh and Parvinder. He denied that on 28.7.2009 and 29.7.2009, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He admitted that the respondent had filed a suit for injunction against him and other petitioners in the Court of Ld. Civil Judge, Sr. Division Nalagarh, the copy of which is Ex. PR-7. He expressed his ignorance that Pankaj Jha and Ajay Pandey were also transferred, along-with him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

9. The petitioner Shri Sanjay Thakur, appeared into the witness box as PW-3 and tendered his affidavit Ex. PW-3/A in examination-in-chief, wherein he also deposed to the similar effect as deposed by PW-1 & PW-2 including that he had been given appointment by the respondent company in December, 2005 as wireman and worked as such till July, 2009 on monthly salary of Rs. 4,400/-. In the cross-examination he admitted that he was regularized on 1.3.2007. The copy of chargesheet dated 7.7.2009 is Ex. PW-3/B. He denied that show cause notice Ex. PW-3/C dated 17.6.2009 regarding less production and wrongful rejection inventor pieces, had been issued to him. He admitted that vide letter Ex. PW-3/D dated 10.7.2009, he had filed reply to chargesheet and show cause notice. He admitted that he was transferred from Baddi vide letter dated 23.7.2009, Ex. PW-3/F. He also admitted that letter Ex. PW-3/D had been written by him in his hand. He further admitted that he had not joined his new place of posting. He denied that on 27.7.2009 he along-with other petitioners had formed a group and threatened the security guards, Sanjay Kumar, Ramesh and Parvinder. He denied that on 28.7.2009 and 29.7.2009, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He admitted that the respondent had filed a suit for injunction against him and other petitioners in the Court of Ld. Civil Judge, Sr. Division Nalagarh, the copy of which is Ex. PR-7. He expressed his ignorance that Pankaj Jha and Ajay Pandey were also transferred, along-with him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

10. PW-4 Shri Rajesh Kumar (petitioner) has also tendered his affidavit Ex. PW-4/A in examination-in-chief wherein he also supported all the material facts as deposed by PW-1 to PW-3 including that he had been given appointment by the respondent company as Testing Engineer, in November, 2005 on monthly salary of Rs. 5500/- and worked as such till July, 2009. In cross-examination, he admitted that vide Ex. RW-1/A he had field reply to chargesheet and show cause notice. He denied that he was appointed on 1.3.2007. He denied that on 27.7.2009 at about 1:00PM, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He expressed his ignorance that Pankaj Jha and Ajay Pandey were also transferred, along-with him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

11. The petitioner Shri Rajeev Kumar appeared into the witness box as PW-5 and tendered his affidavit Ex. PW-5/A in examination-in-chief wherein he has stated that he was given appointment by the respondent in April, 2005 as senior technician on monthly salary of Rs. 5,600/- and worked as such till April, 2009. In cross-examination, he admitted that vide Ex. RW-5/A he had field reply to chargesheet and show cause notice. He denied that he was appointed on 1.8.2006. He further denied that on 27.7.2009 at about 1:00PM, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He expressed his ignorance that Pankaj Jha and Ajay Pandey were also transferred, alongwith him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

12. The petitioner Shri Rakesh Kumar has tendered his affidavit Ex. PW-6/A in examination-in-chief while appearing into the witness box as PW-6 wherein he has stated that he was given appointment by the respondent in March, 2005 as Quality Check Controller on monthly salary of Rs. 5500/- and worked as such till July, 2009. In cross-examination, he denied that he was

appointed on 1.6.2005. He denied that on 27.7.2009 at about 1:00PM, he along-with other petitioners forcibly stopped the willing workers to enter the factory premises and instigated strike, used abusive language against the officials of respondent company. He also denied that he along-with other petitioners created atmosphere of fear and lawlessness and had not allowed any worker to perform the duties. He expressed his ignorance that Pankaj Jhaa and Ajay Pandey were also transferred, along-with him, who have joined their new place of posting. He denied that he was terminated on account of misconduct being indulged in by him.

13. In rebuttal the respondent has examined five witnesses in all. RW-1 Shri Parmeshwar Prasad Singh has tendered his affidavit in examination-in-chief Ex. RW-1/A wherein he has supported all the contents of reply filed by the respondent including that all the petitioners had been employed at the inverter division of the respondent situated at Baddi, HP and as per the business need/exigencies, in the month of July, 2009, S/Shri Rakesh Kumar, Rajeev Kumar, Sanjeev Kumar, Sanjay Thakur, Sunil Kumar, Ajay Pandey and Prakash Jhaa had been transferred from Baddi to various locations around Dehli/NCR, Jaipur and Agra besides protecting the existing service conditions and service benefits/compensation and all the transferred employees had also been given upfront hike in their salary as displacement allowance. He further deposed that out of seven transferred employees, only two employees namely Ajay Pandey and Prakash Jha joined the place of transfer at Gurgaon. The remaining five transferred employees, as aforesaid, had not joined at transferred place and adopted unconstructive approach towards their transfer and refused to receive their transfer orders and started creating ruckus in the factory premises. Since, the transferred employees had not been permitted to continue work at factory, they along-with suspended workman Shri Rajesh Kumar made forcible entry in the premises and manhandled the security personnel and hurled filthy abuses. On account of such act, the production suffered drastically and the respondent could not meet the production target for 27.7.2009. The strike continued till 30th July, 2009 and thus keeping in view the menace created in such short span of time, the continuation in employment of petitioners was found highly detrimental to the industrial enterprises and as such the services of the petitioners were dispensed with. He also tendered in evidence the copy of Board resolution of Sukam Power System Ltd., Ex. RW-1/B, copies of termination letters along-with the cheques of full & final dues sent to the petitioners Ex. RW-1/C to Ex. RW-1/H, copies of show cause notice/reminder/chargesheet issued to the petitioner Shri Rajesh Kumar, Ex. RW-1/L-1 to Ex. RW-1/L-3, copies of show cause notice/reminder/chargesheet issued to the petitioner Shri Rajeev Kumar, Ex. RW-1/M-1 to Ex. RW-1/M-3, the copy of reminder to show cause issued to the petitioner Shri Sanjeev Kumar, Ex. RW-1/N, the copy of letter dated 23.6.2009 issued to petitioner Shri Sanjay Thakur, Ex. RW-1/O, copies of show cause notice and reminder sent to petitioner Sunil Kumar Ex, RW-1/P-1 and Ex. RW-1/P-2, the copy of show cause notice issued to the petitioner Shri Rakesh Kumar, Ex. RW-1/Q, copy for transfer letters issued to Rakesh Kumar, Ex. RW-1/R-1, Rajeev Kumar Ex. RW-1/R-2 and Sanjeev Kumar Ex. RW-1/R-3. This witness further deposed that he is conversant with the signatures of Mr. Manoj Goel & Vipul Jain as he had worked with them. The copies of letters dated 27.7.2009, 28.7.2009, 29.7.2009, 16.6.2009, 30.7.2009, 1.8.2009 (two letters), 3.8.2009 (three letters), and 4.8.2009, which had been signed by Mr. Manoj Goel/Vipul Jain are Ex. RW-1/S-1 to Ex. RW-1/S-11. Ex. RW-1/S-12 is the copy of letter dated 3.8.2009 written to SHO Baddi. The detail of transferred workers signed by Mr. Manoj Goel is Ex. RW-1/T and the detail of technical competence of transferred employees is Ex. RW-1/P-2. The details of employees sent to Gurgaon unit for training is Ex. RW-1/P-3. In the cross-examination, he has stated that on 23rd July, 2009, the company tried to give the transfer letter to all the petitioners except one Shri Rakesh Kumar in the premises of the company but they refused to take transfer letters. He denied that the transfer letters along-with full & final dues had been sent to the petitioners intentionally at their permanent address. He also denied that the company had not made known to the petitioners about the transfer policy at the time of their appointment. He denied that

the petitioners had not gone on strike on the ground of their transfer. He denied that the petitioners were intentionally and deliberately dismissed from service.

14. Shri P.C Shukla, (RW-2) has deposed that he joined as Assistant Manager with the respondent company at unit no. 6467, Baddi on 19.11.2007 and he knows Shri Sanjay Kumar, who was Production Engineer and Tarsem Kumar, line leader and also recognized their signatures in red circle at point E on Ex. RW-2/B. Ex. RW-2/C is the production report which has been prepared by him. He also recognized the signatures of Shri Sanjay Kumar on Ex. RW-2/E and Shri Sachin Bajaj on Ex. RW-2/F. In the cross-examination, he stated that during the period of strike, the production level came down by 90% but the production percentage is not shown in production report Ex. RW-3/C.

15. RW-3, Shri Pankaj Jaswal, has stated that the show cause notice/reminder/chargesheet issued to Rajesh Kumar, Ex. RW-1/L to Ex. RW-1/L-3, show cause notice/remainder/ chargesheet issued to Rajeev Kumar Ex. RW-1/M-1 to Ex. RW-1/M-3, show cause notice /remainder/chargesheet issued to Sanjeev Kumar Ex. PW-2/C, Ex. PW-2/B, Ex. RW-1/N and Ex. RW-1/R-3, show cause notice/ remainder/chargesheet issued to Sanjay Kumar Ex. PW- 3/C, RW-1/O and Ex. PW-3/F and the show cause notice/remainder/chargesheet issued to Sunil Kumar Ex. RW-1/P-2, Ex. RW-1/P-1, Ex. PR-1 and Ex. PR-3, had been refused by them in his (RW-3) presence and he had put the endorsement and signed the same. In the cross-examination, he denied that the notices/reminders/chargesheets/transfers orders had not been refused to be accepted by the petitioners in his presence.

16. RW-4 Shri Sunil Kumar, Senior Assistant, O/o Labour Commissioner Shimla has deposed on the basis of record that vide Ex. RW-4/A and Ex. RW-4/B, the conciliation proceedings dated 10.8.2009 and 13.8.2009 had been conducted by the Joint Labour Commissioner, Shimla between workers and the management. Ex. RW-4/C is the order of Labour Commissioner prohibiting the strike in the respondent company and standing orders of the company is Ex. RW-4/D. The copy of letter dated 3rd August, 2009 is Ex. RW-4/E and the copy of this letter had also been received by the Labour Commissioner vide Ex. RW-4/F. Ex. RW-4/G is the letter dated 13th August, 2009 written by the respondent to Labour Commissioner's office.

17. RW-5 Shri S.S Bisht, Labour Inspector, Baddi has stated that Ex. RW-5/A is the letter dated 28.7.2009 and Ex. RW-5/B is the conciliation dated 29.7.2009 between workers and respondents. Ex. RW-5/C is the conciliation notice dated 5.8.2009 and failure report under section 12 (4) of the I.D Act is Ex. RW-5/D.

18. Besides having heard the learned counsel for the parties, I, have also gone through the record of the case carefully.

19. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:

Issue no. 1. No.

Issue no. 2. No.

Issue no. 3. Yes.

Issue no. 4. Entitled to lump sum compensation.

Issue no. 5. No.

Issue no.5-A Yes.

Relief. Reference partly allowed in favour of petitioners per operative part of award.

REASONS FOR FINDINGS

***Issue no. 1***

20. Learned counsel for the petitioner contended that the petitioners have been transferred to the different branches of the respondent company out-side the State of Himachal Pradesh in a malafide manner whereas the learned counsel for the respondent contended that the petitioners have been transferred from Baddi plant to various locations as per the business need and such transfers have always been a routine affair and there was no malafide intention on the part of the respondent in transferring the petitioners.

21. I have gone through the respective contentions of the learned counsel for the parties and also closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that all the petitioners were employed at the inverter division of respondent situated at Baddi and all of them were the residents of Himachal Pradesh. On 23rd July, 2009, all the petitioners except Rajesh Kumar were transferred to various locations out-side the state of Himachal Pradesh. Ex. RW-5/D, is the transfer letter issued to petitioner Rajeev Kumar wherein he was ordered to be transferred from Inverter Plant Baddi to Service Department, New Delhi. Ex. PR-3, is the transfer letter issued to petitioner Shri Sunil Kumar, who was ordered to be transferred from Inverter Plant Baddi to Service Department Jaipur. Ex. RW-1/R-1, and Ex. RW-2/F are the transfer letters issued to petitioners Shri Rakesh Kumar and Shri Sanjeev Kumar, who were ordered to be transferred from Baddi to Plot no. 196-C Industrial Vihar, Phase-6, Gurgaon and Vide Ex. PW-3/R, petitioner Shri Sanjay Kumar was ordered to be transferred from Baddi to TRC Centre Gurgaon. It is the admitted case of the petitioners that they did not join at the transferred places. It is also the admitted case of the respondent that at the time of their appointment, no appointment letters had been issued to the petitioners. The contention of the respondent is to this effect that the petitioners were transferred as per the certified standing orders Ex. RW-4/D. Clause 4.1.3 of the certified standing orders provides that every employees shall be given a letter of appointment, in the prescribed form stating briefly the terms and conditions of such appointment. However, if for any reasons, the appointment letter is not given at the time of recruitment or joining, the management shall have right to issue the appointment letter even at later stage. At the same time when regard is given to cross-examination of RW-1 Shri Parmeshwar Parsad he has admitted that the petitioners were not given the letters of appointment. Clause 19 of the Certified Standing orders Ex. RW-4/D, provides for the transfers of the employees and clause 19.1, reads as under:

> "As per the business exigency, employee shall be liable to be transferred from one post, department, section, unit, office, branch or factory, to another belonging to or managed/operated by the same company/management or any of its associates, whether existing or whether coming into existence/acquired subsequent to the appointment."

It is well established that the standing orders have the force of law and the same constitute statutory terms of employment. From the perusal of standing orders Ex. RW-4/D, it is clear that the employees shall be liable to be transferred as per the business exigencies. It is a settled position of law that the transfer of an employee is an incidence of service and is a matter of internal management of the company. **In (2004) 3 SCC 172**, **titled as Pearlite Liners (P) Ltd Vs. Manorama Sirsi**, it has been held by the Hon'ble Apex Court that unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. The Hon'ble Apex Court has held as under:

"Unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. The plaintiff has neither pleaded nor has there been any effort on her part to show that the impugned transfer order was in violation of any term of her employment. In the absence of a term prohibiting transfer of the employee, prima facie the transfer order cannot be called into question".

22. In the present case it has been stated in the petition that the respondent has transferred the petitioners out-side the State with malafide intention. However, no evidence had been led by the petitioners in this respect to prove malafide on the part of the respondent. When regard is given to the evidence of the petitioners, it may be pertinent to mention here that the petitioners Sunil Kumar (PW-1), Sanjeev Kumar (PW-2) and Sanjay Thakur (PW-3) had not uttered even a single word in their affidavits which have been filed by way of evidence regarding the alleged malafide transfers. Though, PW-5 Shri Rajeev Kumar and PW-6 Shri Rakesh Kumar have averred in their affidavits, filed by way of evidence, that the respondent transferred them to settle the scores, however, to prove their such allegations, except for their bald statements, no other evidence had been led by them. The petitioners have neither pleaded nor proved that their transfer orders were in violation of any term of their employment. Therefore, in the absence of any proof of malafide on the part of the respondent and also in view of the certified standing orders Ex. RW-4/D, it can safely be held that the transfer of the petitioners was not illegal and unjustified. Accordingly, this issue is decided in favour of the respondent and against the petitioners.

**Issue no. 2.**

23. The respondent had placed on record the copies of chargesheet regarding "going slow" Ex. PR-1, Ex. PW-2/B, Ex. PW-3/B, Ex. RW-1/L-3 to all the petitioners including suspended petitioner Shri Rajesh Kumar. When regard is given to the affidavit Ex. PW-4/A, filed by petitioner Rajesh Kumar (PW-4) in his examination-in-chief he categorically stated that in the month of June, 2009, his father suffered heart attack and he had to rush to his native place to look-after his father and he also informed his head of department. He further stated that when he came back to join his duties, he was not allowed to resume the same on the pretext that a departmental enquiry would be initiated against him. He was suspended by means of letter dated 16.7.2009 w.e.f. 17.7.2009 till the completion of the proceedings of domestic enquiry and was also ordered to be paid subsistence allowance. However, no evidence has been led by Rajesh Kumar in order to prove that he was suspended in an illegal and unjustified manner by the respondent. Even, in his affidavit by way of evidence he has not uttered even a single word about this aspect of the matter. Therefore, in the absence of any evidence on record, it cannot be said that the petitioner Shri Rajesh Kumar was suspended in an illegal and unjustified manner. Hence, this issue is answered in favour of the respondent and against the petitioner Shri Rajesh Kumar.

**Issues no. 3 & 5-A.**

24. The learned counsel for the petitioners contended that the petitioners had been wrongly terminated by the respondent without holding any enquiry and without giving any opportunity of being heard to them and the management of the company had already made up their mind to throw them out of the employment.

25. Conversely, the case of the respondent is that the five transferred workmen along-with suspended workman Shri Rajesh Kumar started indulging in pressure tactics to avoid their transfers and started ruckus in the factory premises and they also started stopping the workmen to enter in the factory and also instigated the workmen to go on strike and resultantly around eighty workmen abstained from work and joined the illegal strike which continued till 30.7.2009. The further case of

the respondent is that the acts committed by the petitioners are very grave and keeping in view the major misconduct, the services of all the petitioners were terminated on 30.7.2009 without conducting any domestic enquiry as the same was not practically possible at that point of time and a detailed order was issued containing the circumstances leading to the decision of dismissal.

26. From the perusal of record, it has become clear that all the petitioners were dismissed from service on 30.7.2009 without holding any domestic enquiry as admitted by the respondent. Now, the question which arises for consideration before this Court is as to whether the action of the respondent was illegal and unjustified in terminating the services of the petitioners without holding the domestic enquiry and without following the principles of natural justice on the ground of the major misconduct. It is a settled legal proposition that a workman against whom the misconduct is alleged cannot be dismissed unless a proper domestic enquiry is held against him in respect of the alleged misconduct. Even, if the alleged misconduct is proved against the workman, he cannot be discharged or dismissed from service unless he has been afforded opportunity of being heard before initiating any action against him by the employer/respondent. The certified standing orders of the respondent Ex. RW-4/D also provides for conducting of the enquiry for misconduct. Clause 31 of the aforesaid standing orders provides for the procedure for dealing with the cases of misconduct and disciplinary proceedings. It has been specifically provided therein that in normal circumstances no order for punishment shall be passed unless, the concerned employee is given an opportunity to submit his explanation in writing in respect of the charges of misconduct alleged against him. Clause 31.1 to 31.5 of certified standing orders are reproduced as under:

> "31.1 An employee against whom misconduct is alleged shall be given a charge sheet personally, through the authorized management representative, clearly setting forth briefly the fact and the circumstances alleged against him, the nature of the misconduct and requiring his explanation. The chargesheeted employee shall be given minimum 48 hours time to submit his explanation to the chargesheet. If the employee refuses to accept the charge sheet, it shall be pasted on the notice board or a copy of the same shall be sent at the available address of the employee through registered/speed post and it shall be deemed to have been served upon him.
>
> 31.2 The manager upon receiving such explanation shall consider the same and proceed accordingly. No formal enquiry shall however, be necessary, if the explanation is found satisfactory or when the employee expressly admits the charges, the management or the manager may award any one of the punishment provided in clause-30 without holding any enquiry. However, if the charge sheeted employee admits only one or some of the charges leveled against him, the enquiry would be held in respect of the charges not admitted by the employee.
>
> 31.3. In case the employee fails to submit his explanation within the prescribed time or extended time allowed to him, is shall be presumed that he employee accept the charges and has nothing to say on his part against the charges alleged against him and the management shall award appropriate punishment provided in clause 30 without holding any enquiry.
>
> 31.4. If the explanation was not found satisfactory, a domestic enquiry shall be conducted to ascertain the charges and to provide opportunity of hearing to the concerned employee. In case the alleged acts of misconduct involve several employees, management may constitute a joint enquiry against such employees.
>
> 31.5. Adequate and reasonable opportunity, observing the principles of natural justice will be given to the employee by holding a domestic enquiry according to the following procedure.

However, in the present case admittedly neither any show cause notice nor any chargesheet was issued to the petitioners before terminating them from service. No explanation was called for from the petitioners and no domestic enquiry was conducted to ascertain the charges and to provide the opportunity of being heard to the petitioners in flagrant violation of the principles of natural justice.

27. There can be no dispute about the fact that the respondent is entitled to lead evidence on merits before this Court to prove the misconduct of the petitioners in case their dismissal is found to be in violation of the principles of natural justice. **In (2006)-6 S.C.C 325, titled as Amritt Vanaspati Co. Ltd. Vs. Khem Chand and another**, it has been held by the Hon'ble Apex Court that even if no enquiry has been held by the employer or the enquiry held is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and the employee to adduce evidence before it. During the pendency of the proceedings before this Court, an application under order 6 rule 17 read with section 151 CPC was filed by the respondent and a plea was taken that if the Industrial Tribunal-cum-Labour Court is of the view that the dismissal of the petitioners was in violation of the principles of natural justice, fair hearing or without enquiry, then the respondent be allowed to lead evidence on merits before this Court in order to prove the misconduct against the non-applicants. The aforesaid application was allowed by this Court vide order dated 4.6.2014. Thereafter, both the parties were given opportunities to lead evidence and both the parties had adduced evidence before this Court.

28. Now, the next question which arises for consideration before this Court is as to whether the alleged misconduct has been proved against the petitioners or not. It is the admitted case of the respondent that no enquiry was conducted before terminating the services of the petitioners. The perusal of the record makes it clear that Ex. RW-1/F is the termination letter issued to petitioner Shri Sanjeev Kumar, Ex. RW-1/D is the termination letter issued to petitioner Shri Rajeev Kumar, Ex. RW-1/G, is the termination letter issued to petitioner Shri Sanjay Kumar, Ex. RW-1/E is the termination letter issued to petitioner Shri Rakesh Kumar, Ex. RW-1/H is the termination letter issued to petitioner Shri Sunil Kumar and Ex. RW-4/D, is the termination letter issued to petitioner Shri Rajesh Kumar. The grounds as mentioned in the aforesaid termination letters are almost common and are summarized as follows:

1. That the petitioners had violated the orders of the management and misbehaved with their superiors and also created ruckus, indiscipline and anarchy in the premises as a result of which the company had suffered loss of about Rs. 2.25 crore

2. That on 23.7.2009, all the petitioners were transferred but they have refused to accept the transfer letters in the presence of Pankaj Jaswal and Chander Negi.

3. That on 27.7.2009, they entered forcibly into the premises of the company at 8:30 AM and when the security personnel Shri S.S Chandel had told them to report at transferred places then they started quarreling with him and also manhandled Assistant Security Officer as well as security personnel S/Shri Sanjay Kumar, Ramesh and Parvinder and threatened them they would be done to death.

4. They started roaming in the factory premises of the factory and misbehaved with Shri Sachin Bajaj, the departmental head but Shri Chander Negi intervened and that after lunch hours they again entered the premises of the factory along-with suspended workmen Shri Rajesh Kumar and started instigating the other workers as a result of which the company suffered losses and the rate of production fell down.

5. That on 28.7.2009, they entered the factory premises and stopped the wiling workers at the gate and started raising slogans and abusing the senior managers in the name of mother and sister and as a result of the illegal strike the company suffered losses and the rate of production fell down.

6. That on 29.7.2009, at about 7:30 AM, all the petitioners had made forcible entry into the premises of factory and threatened the electricians, security personnel and other employees and stopped them to do work as a result of which the Police had to be called and at that time Mr. Deepak, Dinesh and Vijender Chandel were also present and due to the acts of the petitioners about 80-85 workers remained on strike.

7. That on 30.7.2009, also all the petitioners instigated 80-85 workers who continued to remain on illegal strike and also threatened the other workers as well as the visitors in the presence of security personnel and Vijender Chandel.

8. That the company suffered financial losses and loss in the production on 27th , 28th and 29th July, 2009.

9. That in past also they were involved in such illegal activities and on 7.7.2009, the company issued them show cause notice for going slow for which a chargesheet was also issued to them and on 10.7.2009, they had admitted all the charges and also gave apology which was accepted by the management.

29. However, to prove the aforesaid grounds of termination, the respondent examined RW-1 Shri Parmeshwar Prasad, Sr. Manager (L&S), who in his affidavit Ex. RW-1/A deposed that the five transferred employees started indulging in nefarious pressure tactics to avoid their transfers and along-with suspended workman Shri Rakesh Kumar started creating ruckus in the factory premises. He further deposed that in the morning of 27.7.2009, they made forced entry in the factory premises and manhandled the security personnel in the factory and hurled filthy abuses and after lunch on that day the transferred employees along-with suspended employee started roaming inside the factory and coercing other working employee to stop production and misbehaved with Managers/Supervisors. He also deposed that on 28.7.2009, they gathered at the factory gate before the start of the general shift and started shouting slogans and hurled highly dirty abuses in the name of mother and sister to the senior officers of the respondent and stopped the workmen from entering the factory and induced them to proceed on strike and resultantly around eighty workmen abstained from work and joined the strike instigated by the petitioners which continued for the next two days on 29th and 30th July, 2009 and in these two days their height of misconduct reached its hilt. He also deposed that on 29.7.2009, the petitioners targeted the technicians, staff members and willing workmen and threatened them openly. He also stated that since the acts committed by the petitioners were very grave, the respondent dismissed their services without conducting domestic enquiry as it was not practically feasible at that point of time keeping in view the imminent danger to life and limbs of the personnel of respondent.

30. It is pertinent to mention here that except for the bald statement of RW-1, no other witness has been examined by the respondent to prove the aforesaid misconduct against the petitioners. The statement of RW-1 has not been supported by any other witness and had gone uncorroborated. No worker has been examined by the respondent to prove that the petitioners created ruckus, indiscipline and anarchy in the factory premises. No security personnel was examined by the company in order to prove that they were manhandled by the petitioners. No senior official has stepped into the witness box in order to prove that the petitioners hurled abuses to them and misbehaved with them. Neither Sachin Bajaj nor Chander Negi and Vijender Chandel

had stepped into the witness box in order to support the case of the respondent. Similarly, S/Shri Sanjay Kumar, Ramesh and Parvinder also failed to appear in the witness box to state that they were manhandled and threatened by the petitioners. At this stage, I would like to point out that the best evidence which the respondent was required to adduce before this Court could have been the workers/officers/security personnel's with whom the petitioners have allegedly misbehaved but no such evidence had been brought before this Court by the respondent. Though, the respondent examined RW-2 Shri P.C Shukla, Assistant Manager, in order to prove the production report Ex. RW-2/C, but if his statement is pursued then he has only stated that there was a down fall in the production w.e.f. 5.6.2009 to 16.6.2009. However, no evidence has been led by the respondent on record to show that the production level came down during the period of strike and the company suffered losses of Rs. 2.25 crore. In cross-examination, RW-2 admitted that the strike commenced from the last week of July, 2009 and during this period the production level came down by 80% to 90%. However, at the same time he admitted in the cross-examination that the percentage of production level has not been shown in the production report Ex. RW-2/C. Admittedly, no production report has been placed on record qua reduction in production after 16.6.2009 as admitted by RW-2 in his cross-examination. Therefore, in the absence of any evidence on this aspect of the matter it cannot be said that there was a down fall in the production and the company suffered losses due to strike. RW-3 Shri Pankaj Jaswal had only stated that the show cause notice/reminder/chargesheet issued to the petitioners were refused to be accepted by them in his presence and except that he had not uttered even a single word about creation of ruckus by the petitioners in the factory premises and about their violent behavior. No other evidence has been led by the respondent to prove the alleged major misconduct against the petitioners as mentioned in the termination letters.

31. Therefore, in view of the fact that neither any domestic enquiry was conducted against the petitioners nor the major misconduct has been proved before this Court by the respondent, it can safely be held that the dismissal of the petitioners was illegal and unjustified, hence, both these issues are decided accordingly.

**Issue no. 5**

32. Now, the next question which arises for consideration before this Court is as to whether the strike resorted to by the workmen was legal or illegal. Admittedly, there was a strike resorted by the workmen of the respondent company which was prohibited by the Labour Commissioner vide order dated 13.8.2009, Ex. RW-4/C, wherein it has been mentioned that due to adamant attitude of both the parties, the dispute could not be settled. It has been admitted by the petitioners in their petition that the workers were on strike to fulfill their demands and were sitting out-side the factory gate and demonstrating their agitation peacefully. As per the certified standing orders Ex. RW-4/D vide its clause 25.1, it has been mentioned that the employees shall not go on strike without giving fourteen days' notice or in contravention with the provisions provided under the Industrial Disputes Act, 1947. It has also been provided therein that the employees in the event of any grievance, shall first try to resolve the same by mutual negotiations and the machinery provided under these standing orders. But the petitioners have failed to prove on record that they have gone on strike after giving fourteen days notice to the management. It is the admitted case of the parties that all the petitioners except suspended petitioner Shri Rajesh Kumar were transferred out of State of Himachal Pradesh and they were aggrieved by the transfer orders. However, there is no material whatsoever placed on record to suggest that at any point of time before going on strike they tried to resolve the matter by mutual negotiations as provided in the standing orders. Therefore, keeping in view the entire evidence on record and also the standing orders of the company, it cannot be said that the strike resorted to by the petitioners was legal. Since, the strike was illegal and unjustified, therefore, the petitioners are not entitled to wages for the period of

strike and as per standing orders, the respondent is entitled for deduction of their wages proportionally on the basis of "no work, no pay" as per clause 25.4 of the Standing orders. Accordingly, this issue is answered in favour of the respondent and against the petitioners.

**Issue no. 4**

33. Since, I have held under issues no. 3 & 5-A, that the dismissal of the petitioners along-with suspended workman Shri Rajesh Kumar on the ground of major misconduct is not legal and justified, hence, the question arises as to what service benefits, the petitioners are entitled. It is by now well settled that if the termination of employee is found to be illegal, the relief by way of reinstatement with back-wages is not automatic. The Hon'ble Supreme Court in **Santosh Kumar Seal and others reported in 2010 LLR 677: 2010 III CLR 17 SC,** has held that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that mandatory compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate.

34. **In Jagbir Singh Vs. Haryana State Agricultural Marketing Board (2009) 15 SCC 327, the Hon'ble Supreme Court** has held that:

> "It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and maybe wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.**"**

35. In the present case, even though the termination of the petitioners is held to be illegal but their reinstatement will not be appropriate relief as in view of the allegations and counter allegations there had been a bad blood between the parties. The perusal of the material on record shows that there had been strained relations between the petitioners and respondent as earlier five petitioners were transferred out-side the state of Himachal Pradesh and one of the petitioners Shri Rajesh Kumar was suspended and thereafter they resorted to an illegal strike, therefore, in such a situation, it would not be appropriate to make the order of reinstatement in the present case. Hence, taking into account all the facts and circumstances of the case, the ends of justice would be met, if the lump sum compensation in lieu of reinstatement and back-wages is awarded to the petitioners.

36. It is not disputed that the petitioners were the regular and confirmed employees of the respondent company and their services were of permanent charcter. Therefore, in my view the petitioners are entitled to receive a suitable, appropriate, just and equitable compensation from the respondent and it would be quite reasonable and justified if lump sum compensation of Rs. 3,00,000/- (three lakhs only) is awarded to each of the petitioners instead of reinstatement. Consequently, this issue is decided in favour of the petitioners.

***Relief***

As a sequel to my findings on the aforesaid issues, the claim of the petitioners is partly allowed and as such the respondent is directed to pay Rs. 3,00,000/- (Rs. three lakh only), as lump sum compensation to each petitioner within three months from today failing which the same shall carry interest @ 9% per annum from the date of publication of this award. The reference is

answered accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open court today on this 9th day of November, 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 71 of 2013.
Instituted on : 22.10.2013.
Decided on : 20.11.2015.

Shyam Singh S/o late Shri Sher Singh R/o Village Neri, P.O Barog, Tehsil Theog, District Shimla, HP. *…Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. *...Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947*

**For petitioner** : Shri T.S. Chauhan, Advocate.

**For respondent** **:** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Shyam Singh S/o Shri Sher Singh R/o village Neri, P.O Barog, Tehsil Theog, District Shimla HP who was employed as mess helper w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further

stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 2.6.2006 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner w.e.f. 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? . . .*OPP.*

3. Whether this petition is not maintainable in view of preliminary objections? . . .*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no. 1 Yes.

Issue no. 2 Entitled to reinstatement with seniority and continuity but without back-wages

Issue no. 3 No.

Relief. Reference answered in favour of the petitioner and against the respondent per operative part of award.

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as mess helper by the respondent after completing selection process. He further contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves. He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 2.6.2007 as mess helper vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 2.6.2007 to 15.4.2011. No notice had been issued to him before his termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as mess helper on 26.5.2007 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked w.e.f. June, 2007 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 1400/- per month as salary. In cross examination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that

the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as mess helper by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. June, 2007 till June, 2009 as per year wise detail of days Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 197 days in the year, 2007, 289 days in the year, 2008 and 150 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:—

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the

workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In the present case the petitioner has proved on record by examining PW-2 Shri PapinderKumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages,

which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement.

Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no. 3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 68 of 2013.

Instituted on. : 1.10.2013.

Decided on : 20.11.2015.

Rajesh Singh S/o Shri Hira Singh R/o Village Bagri, P.O Chella, Tehsil Theog, District Shimla, HP. . . .*Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. . . .Respondent.

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri T.S Chauhan, Advocate.

**For respondent :** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Rajesh Singh S/o Shri Hira Singh R/o Village Bagri, P.O Chella, Tehsil Theog, District Shimla, HP who was employed as mess helper w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 1st September, 2007 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the

petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner w.e.f. 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged?. . .*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?

3. Whether this petition is not maintainable in view of preliminary objections? . . .*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no. 1 | Yes. |
| Issue no. 2 | Entitled to reinstatement with seniority and continuity but without back-wages. |
| Issue no. 3 | No. |
| Relief. | Reference answered in favour of the petitioner and against the respondent per operative part of award. |

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as mess helper by the respondent after completing selection process. He further contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves. He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 1.9.2007 as mess helper vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 1.9.2007 to 15.4.2011. No notice had been issued to him before his termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as mess helper on 14.8.2007 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked *w.e.f.* September, 2007 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 2250/- per month as salary. In cross examination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent

in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as mess helper by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. September, 2007 till June, 2009 as per year wise detail of days Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 120 days in the year, 2007, 285 days in the year, 2008 and 144 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:-

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be

concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In the present case the petitioner has proved on record by examining PW-2 Shri Papinder Kumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

"16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no.3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

| | | |
|---|---|---|
| Ref. No. | : | 76 of 2013. |
| Instituted on. | : | 5.10.2013. |
| Decided on | : | 20.11.2015. |

Ishwar Dyal S/o Shri Sohan Lal R/o Village Kotla Panjola, Tehsil Pachad, District Sirmour, H. P. . . .*Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. . . .*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri T.S Chauhan, Advocate.

**For respondent** **:** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Ishwar Dyal S/o Shri Sohan Lal R/o Village Kotla Panjola, Tehsil Pachad, District Sirmour, HP who was employed as mess helper w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 1.9.2007 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the

respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner w.e.f. 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged? . . .*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? . . .*OPP.*

3. Whether this petition is not maintainable in view of preliminary objections? ...*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no. 1 | Yes. |
| Issue no. 2 | Entitled to reinstatement with seniority and continuity but without back-wages |
| Issue no. 3 | No. |
| Relief. | Reference answered in favour of the petitioner and against the respondent per operative part of award. |

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as mess helper by the respondent after completing selection process. He further contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves.

He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 1.9.2007 as mess helper vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 1.9.2007 to 15.4.2011. No notice had been issued to him before his termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as mess helper on 14.8.2007 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked w.e.f. September, 2007 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 1800/- per month as salary. In cross examination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as mess helper by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. Sept. 2007 till June, 2009 as per year wise detail of days Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 122 days in the year, 2007, 292 days in the year, 2008 and 146 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now

well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:—

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible

reason. In the present case the petitioner has proved on record by examining PW-2 Shri Papinder Kumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the

petitioner is not entitled to any back-wages. Accordingly, issue no. 2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no. 3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

| | | |
|---|---|---|
| Ref. No. | : | 70 of 2013. |
| Instituted on | : | 1.10.2013. |
| Decided on | : | 20.11.2015. |

Hem Raj S/o Shri Chet Ram R/o Village Chawri, P.O Barog, Tehsil Theog, District Shimla, HP. . . .*Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. . . .*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri T.S Chauhan, Advocate.

**For respondent :** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Hem Raj S/o Shri Chet Ram R/o Village Chawri, P.O Barog, Tehsil Theog, District Shimla, HP, who was employed as mess helper w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 8th March, 2006 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner *w.e.f.* 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged?. . .*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? . . .*OPP.*

3. Whether this petition is not maintainable in view of preliminary objections? . . .*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue no. 1 : Yes.

Issue no. 2 : Entitled to reinstatement with seniority and continuity but without back-wages

Issue no. 3 No

Relief. Reference answered in favour of the petitioner and against the respondent per operative part of award.

REASONS FOR FINDINGS

***Issue no.1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as mess helper by the respondent after completing selection process. He further contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves. He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 8.3.2006 as mess helper vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 8.3.2006 to 15.4.2011. No notice had been issued to him before his

termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as mess helper on 18.11.2005 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked w.e.f. August, 2005 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 1400/- per month as salary. In crossexamination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as mess helper by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. August, 2005 till June, 2009 as per year wise detail of days Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 87 days in the year, 2005, 239 days in the year, 2006, 281 days in the year, 2007, 284 days in the eyar, 2008 and 146 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:—

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In the present case the petitioner has proved on record by examining PW-2 Shri Papinder Kumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the

petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no.3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records. Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P)**

Ref. No. : 69 of 2013.

Instituted on. : 1.10.2013.

Decided on : 20.11.2015.

Brahma Nand S/o Shri Surat Ram R/o Village Jhaloti, P. OBarog, Tehsil Theog, District Shimla HP. . . .*Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. . . .*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri T.S Chauhan, Advocate.

**For respondent :** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Brahma Nand S/o Shri Surat Ram R/o Village Jhaloti, P. OBarog, Tehsil Theog, District Shimla, HP, who was employed as cook w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 1.9.2007 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner w.e.f. 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged? . . .*OPP.*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? . . .*OPP.*

3. Whether this petition is not maintainable in view of preliminary objections? . . .*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | | |
|---|---|---|
| Issue no.1 | : | Yes. |
| Issue no. 2 | : | Entitled to reinstatement with seniority and continuity but without back-wages |
| Issue no. 3 | : | No |
| Relief. | : | Reference answered in favour of the petitioner and against the respondent per operative part of award. |

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as cook by the respondent after completing selection process. He further contended that the services of the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves. He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 1.9.2007 as cook vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 1.9.2007 to 15.4.2011. No notice had been issued to him before his termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as mess helper on 14.8.2007 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for

two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked w.e.f. September, 2007 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 2500/- per month as salary. In cross examination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as Cook by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. September 2007 till June, 2009 as per year wise detail of days Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 122 days in the year, 2007, 292 days in the year, 2008 and 146 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:-

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we***

***are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In the present case the petitioner has proved on record by examining PW-2 Shri Papinder Kumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no.3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 75 of 2013.
Instituted on : 5.10.2013.
Decided on : 20.11.2015.

Kishori Lal S/o Shri Jeet Ram R/o Village & P.O Barog, Tehsil Theog, District Shimla HP.
. . .*Petitioner.*

*Vs.*

Dr. Y.S Parmar University of Horticulture & Forestry, Nauni, District Solan, HP through its Registrar. . . .*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : Shri T.S Chauhan, Advocate.

**For respondent :** Shri Balwant Singh Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether termination of the services of Shri Kishori Lal S/o Shri Jeet Ram R/o Village & P.O Barog, Tehsil Theog, District Shimla HP, who was employed as cook w.e.f. 15.4.2011 by the Registrar, Dr. Y.S Parmar University of Horticulture and Forestry Nauni, District Solan, HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"**

2. In nutshell, the case of the petitioner is that after the completion of education, he got himself enrolled with the employment exchange and came to know that respondent university is engaging staff for mess and an advertisement had been issued by inviting the application form from the eligible candidates by the university and as such he applied for the same and thereafter he was called for interview and was selected for the post of mess helper on contract basis. It is further stated that the petitioner was fulfilling the eligibility criteria as laid down for the aforesaid post. The petitioner joined his duties on 2nd March, 2005 and completed 240 days in each calendar year without any break. The respondent is a university and creation of statute and is governed by statute and it is the statutory liability of the university to maintain the hostel. The canteen is an integral part of the hostel. It is also stated that initially the contract was entered by the petitioner with the university for one year and thereafter the respondent continued the service without the contract and the petitioner used to work on daily wages. On 15.4.2011, the respondent orally terminated the services of the petitioner without issuing any show cause notice and the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) had not been complied with and the persons who are junior to him are continuing in service. The services of the petitioner had been terminated without following the due process of law as no opportunity of being heard was afforded to him and the petitioner is unemployed after his termination. The last drawn wages of the petitioner was Rs. 3500/- per month. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that there was no relationship established between the employer and employee, that the respondent is not an industry and that the claim is beyond limitation. On merits, it has been asserted that the petitioner was neither engaged nor appointed by the respondent, who worked in the hostel of the respondent for the short span of time, hence, the question of completion of 240 days in each calendar year does not arise. It is further asserted that the work of cook was outsourced to the petitioner and the wages were paid to him from the funds which were collected by the students amongst themselves. It is denied that the petitioner had worked with the respondent continuously for a long time and had completed his normal tenure of service in any calendar year. It is clarified that the messes in the hostel of the respondent are run on co-operative basis by the students on "no profit no loss" basis and since the work was outsourced on monthly basis, the question of maintaining any service record does not arise as the petitioner was neither a contractual employee nor a daily wager. It is denied that the persons junior to the petitioner are still working with the respondent. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 17.9.2014.

1. Whether the services of the petitioner w.e.f. 15.4.2011 were terminated without complying with the provisions of the Industrial Disputes Act, 1947 as alleged? . . .*OPP*

2. If issue no.1 is proved in affirmative to what relief of service benefits the petitioner is entitled to? ...*OPP.*

3. Whether this petition is not maintainable in view of preliminary objections? . . .*OPR.*

4. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no. 1 | Yes. |
| Issue no. 2 | Entitled to reinstatement with seniority and continuity but without back-wages |
| Issue no. 3 | No. |
| Relief. | Reference answered in favour of the petitioner and against the respondent per operative part of award. |

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was selected as cook by the respondent after completing selection process. He further contended that the services of

the petitioner had been terminated by the respondent illegally without serving any notice as required under section 25-F of the Act as he had completed 240 working days in each calendar year and the persons junior to him are still working with the respondent.

9. On the other hand, Ld. Counsel for the respondent contended that the work of mess helper was outsourced to the petitioner on contract basis, who was never engaged by the respondent and the wages were being paid to him from the funds collected by the students amongst themselves. He further contended that since the petitioner had been engaged on contract basis, the question of completion of 240 days in each calendar year and application of section 25-F of the Act does not arise.

10. The petitioner while appearing into the witness box as PW-1 has stated that he had been appointed on 2.3.2005 as cook vide appointment letter mark X and he used to live in hostel. There were nine hostels and nine messes at university campus and students were also living in the hostels. He further stated that the messes used to run throughout the year and he was working there as a mess helper from 2.3.2005 to 15.4.2011. No notice had been issued to him before his termination. He had completed 240 days in a calendar year. Ex. PW-1/A is the copy of information sought by him under R.T.I Act and Ex. PW-1/B is the copy of office order dated 30.4.2012. Hostels and messes are permanent in nature and before his termination he used to get only 3500/- as salary and presently he is unemployed. In cross-examination, he admitted that he was being paid through the money collected by the students in the hostel. He further admitted that he had not completed 240 days before his termination. He denied that no appointment letter had been issued to him and he had been appointed under a particular scheme. He denied that he was not qualified for the post against which he was employed.

11. PW-2 Shri Papinder Kumar Clerk of respondent university has stated that the petitioner had been appointed as cook on 3.3.2005 as per Ex. PW-2/A and at present there are twelve hostels in the respondent university. There are separate messes for each hostel and the mess used to run semester wise and after the completion of semester, the mess remain closed for two months. No notice before terminating the services of the petitioner had been given as his services had been engaged for a short period as per the requirement of work. The petitioner had worked w.e.f. March, 2005 till June, 2009 as per Ex. PW-2/B. After the termination of the services of the petitioner other workers have been engaged in the mess. The messes in the university are permanent in nature. The petitioner was getting Rs. 1500/- per month as salary. In cross-examination, he admitted that the petitioner was engaged in the mess on cooperative basis for specific period. He also admitted that the petitioner was being paid the wages out of the money collected by the students and at present the hostels messes are being run on out-source basis.

12. On the other hand, the respondent examined RW-1 Shri Kali Ram Sweta, Superintendent (EC), who has stated that the petitioner was engaged as mess helper temporarily in the year, 2007 for short span of time as per the requirement of mess. The petitioner was never engaged by the university rather was casually engaged by the students welfare officer and the wages to the petitioner were being paid from student's funds collected by themselves. Ex. R-1 is the copy of academic regulation. In cross-examination, he admitted that no notice was issued to the petitioner before terminating his services. He denied that the work of the petitioner was permanent in nature. He admitted that after the termination of the petitioner, fresh workers have been engaged. He also admitted that the work is still available in the mess.

13. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as Cook by the respondent vide letter Ex. PW-2/A and worked as such w.e.f. March, 2005 till June, 2009 as per year wise detail of days

Ex. PW-2/B, placed on record. No, doubt the case of the petitioner is that he had worked with the respondent till 15.4.2011 but when regard is given to entire evidence on record except the bald statement of the petitioner there is nothing on record which could show that the petitioner has worked with the respondent till 15.4.2011. Moreover, the year wise detail of days Ex. PW-2/B, shows that he had worked for 170 days in the year, 2005, 262 days in the year, 2006 283 days in the year, 2007, 283 days in the year, 2008 and 145 days in the year, 2009. There is nothing on record which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is by now well settled that the burden of proof lies on the workman to show that he had worked continuously for 240 days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 in case titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:-

> ***"19…… In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no coworker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service……"***

A bare perusal of the extract of the judgment produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged by the workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination, rather, he himself admitted in cross-examination that he had not completed 240 days before his termination.

15. From the perusal of mandays chart, Ex. PW-2/B, it is abundantly clear that the petitioner had not completed 240 working days in the calendar year preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination.

16. The other plea of the petitioner is to the effect that the persons junior to him have been engaged by the respondent. It has been held by the Hon'ble Supreme Court in a series of judgments that it is not necessary for the workman to complete 240 days during preceding twelve calendar

months for taking the benefits of section 25-G and 25-H of the Act. In the decision titled as **Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192**, it was held by the Hon'ble Apex Court that for attracting the applicability of Section 25G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In the present case the petitioner has proved on record by examining PW-2 Shri Papinder Kumar, Clerk that after his termination, other workers have been engaged in the mess. This witness (PW-2) has categorically stated that after the termination of the petitioner, other workers have been engaged in the mess. This fact has also been admitted by RW-1 Shri Kali Ram Sweta, Superintendent in his cross-examination that after the termination of the petitioner fresh workers had been engaged and no notice was issued to the petitioner before terminating his services. He further admitted that the work is still available in the mess.

17. Thus, having regard to entire evidence on record and in view of above cited rulings, I have no hesitation in coming to the conclusion that after the termination of the services of the petitioner fresh workers have been engaged by the respondent and as such the termination of services of the petitioner by the respondent without complying with the provisions of the Act, 1947 is improper and unjustified as the respondent has violated the principle of "first come last go" and also violated the provisions of sections 25-G & H of the Act. Accordingly, issue no.1 is decided in favour of petitioner and against the respondent.

***Issue no. 2.***

18. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

19. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

20. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

21. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

22. In support of this issue, no evidence was led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no.3 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 20th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**Ref. : 86 of 2013**

**Sh. Sanjay Dutt V/s M/s solvopet plot No. 98 Gondpur Industrial Area, Distt Sirmour.**

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 10.30 AM but none appeared on behalf of the petitioner. Be awaited.

Presiding Judge
Labour Court, Shimla.

**Case Called again**

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 12.45 AM but none appeared on behalf of the petitioner. Be called after lunch.

Presiding Judge
Labour Court, Shimla.

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 3.30 PM. Case called in pre and post lunch session but neither the petitioner nor his Authorized Representative has appeared before this Court, hence ,this Court is left with no other alternative but to decied the same on the basis of material whichever is available on the file. The following reference has been received from appropriate government for adjudication.

**"Whether termination of services of Shri Shamahad Ali R/o Village Kundiyon P.O.Jamniwala, Tehsil Paonta sahib , District Sirmour , HP w.e.f. 7.4.2012(as Alleged by the worker)by the employer M/s Solvopet, plot No.98, Gondpur Industrial Area,Village Nihlgarh , District Sirmour, HP (Factory Office) and M/s Solvopet, R-304, Dua Complex 24,Veer savarkar Block , Vikas Marg, Shankerpur Delhi , 110092 (Corporate Office)without complying with the provision of Industrial Act, 1947 is legal and justified ?If not, what amount of back wages, seniority ,[past service benefit and compensation the above worker is entitled to from the above employer"**

The petitioner has filed the claim on 3.3.2014 and thereafter the reply was filed by the respondent and on the pleadings of the parties, the following issues were framed by this Court on 23.9.2014.

1. Whether the termination of services of the petitioner by the respondents w.e.f. 7.4.2012 is in violation of the provisions of Industrial Disputes Act, as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative to what service benefits, the petitioner is entitled to ? ...*OPP.*

3. Whether the petitioner is not a workmen as alleged? ....*OPR.*

4. Relief

Thereafter, the case was listed for the evidence of the petitioner. However, the petitioner has failed to lead any evidence before this Court in support of his claim petition, in order to show that his services have been illegally terminated by the respondents without complying with the provisions of the Industrial Disputes Act,1947. Hence, the reference , aforesaid , is ordered to be answered against him. Let a copy of this order/award be sent to the appropriate government for publication in the official gazette. File , after completion , be consigned to records .

Announced:
17.11.2015

Sd/-
*Presiding Judge,*
*Labour Court , Shimla.*

Ref. : 85 of 2013

**Sh Sanjay Dutt V/s M/s solvopet plot No. 98 Gondpur Industrial Area, Distt Sirmour.**

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 10.45 AM but none appeared on behalf of the petitioner. Be awaited.

Presiding Judge
*Labour Court, Shimla.*

**Case Called again**

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 12.30 AM but none appeared on behalf of the petitioner. Be called after lunch.

Presiding Judge
*Labour Court, Shimla.*

17.11.2015
Present:- None for the petitioner.
Sh. Vikram Singh Thakur, Advocate vice csl. for respondent.

It is 3.45 PM. Case called in pre and post lunch session but neither the petitioner nor his Authorized Representative has appeared before this Court, hence ,this Court is left with no other alternative but to decied the same on the basis of material whichever is available on the file. The following reference has been received from appropriate government for adjudication.

**"Whether termination of services of ShriSanjay Dutt R/o Village Paagar P.O.Rajpura, Tehsil Paonta sahib , District Sirmour , HP w.e.f. 7.4.2012(as Alleged by the worker) by the employer M/s Solvopet, plot No.98, Gondpur Industrial Area,Village Nihlgarh, District Sirmour, HP (Factory Office) and M/s Solvopet, R-304, Dua Complex 24,Veer savarkar Block , Vikas Marg, Shankerpur Delhi , 110092 (Corporate Office)without complying with the provision of Industrial Act, 1947is legal and justified ?If not, what amount of back wages, seniority ,[past service benefit and compensation the above worker is entitled to from the above employer"**

The petitioner has filed the claim on 3.3.2014 and thereafter the reply was filed by the respondent and on the pleadings of the parties, the following issues were framed by this Court on 23.9.2014.

1. Whether the termination of services of the petitioner by the respondents w.e.f. 7.4.2012 is in violation of the provisions of Industrial Disputes Act, as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative to what service benefits, the petitioner is entitled to ? ...*OPP.*

3. Whether the petitioner is not a workmen as alleged? ...*OPR.*

4. Relief

Thereafter, the case was listed for the evidence of the petitioner. However, the petitioner has failed to lead any evidence before this Court in support of his claim petition, in order to show that his services have been illegally terminated by the respondents without complying with the provisions of the Industrial Disputes Act,1947. Hence, the reference , aforesaid , is ordered to be answered against him. Let a copy of this order/award be sent to the appropriate government for publication in the official gazette. File , after completion , be consigned to records .

Sd/-
*Presiding Judge,*
*Labour Court , Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT, SHIMLA, (H.P).**

Ref. No. : 01 of 2012.
Instituted on : 2.1.2012.
Decided on : 30.11.2015.

Rajesh Kumar S/o Shri Jagat Ram R/o Shop No. 107, Sasbji Mandi Shimla, District Shimla, H.P. . . .*Petitioner.*

*Vs.*

1. The Managing Director, Himachal Road Transport Corporation, Shimla, H.P.

2. The Divisional Manager, Himachal Road Transport Corporation, Solan, District Solan, HP. . . .*Respondents.*

*Reference under Section 10 of the Industrial Disputes Act, 1947.*

**For petitioner** : S/Shri Ramakant Sharma & J.R Sharma Advocates.
**For respondent :** Shri Rahul Kashyap, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

1. **"Whether termination of the services of Shri Rajesh Kumar S/o Shri Jagat Ram R/o Shop No. 107, Subji Mandi, Shimla by i) The Managing Director, Himachal Road Transport Corporation, Shimla, H.P ii) The Divisional Manager, HRTC Solan, District Solan, HP w.e.f.20.3.2001 without giving him advance notice, without paying retrenchment compensation and continuance of juniors & fresh**

**appointments in service has not been denied, therefore, the action in violation of provisions of section 25-F, G & H of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above worker is entitled to from the above management?"**

2. In nutshell, the case of the petitioner is that vide letter dated 13.6.2000, he was initially engaged as electrical helper in electric trade for a period of 89 days and was subjected to medical examination before his joining. At the first instance the petitioner was appointed/engaged for 89 days, however, his services were extended for 89 days till 31st March, 2001. It is further stated that the petitioner had discharged his duties to the best of his abilities and to the entire satisfaction of his superiors and nothing adverse had ever been conveyed to him. The services of the petitioner had been terminated by the Divisional Manager, Solan orally without assigning any reason and without completing the codal formalities as prescribed under the Industrial Disputes Act, 1947 (hereinafter referred to as Act). He had completed 240 days in the preceding twelve calendar months. It is further asserted that junior persons to him have been retained by the respondent. Not only this, the person similarly situated Shri Shyam Lal S/o Shri Durga Dass electrician, who was initially appointed in 2000 and is continuing till date and presently posted at Divisional workshop Tara Devi. The respondent had also engaged fresh hand namely Prem Chand, who was appointed on 20.5.2009. The post of electrician helpers are lying vacant in different divisions. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections qua maintainability, that the petitioner has no locus-standi to file and maintain the present petition, concealment of material facts and estoppel have been taken. On merits, it has been asserted that the petitioner was engaged on part time basis as electrician helper for 89 days w.e.f. 9.6.2000 to 5.9.2000 on fixed remuneration of Rs. 1,000/- per month and necessary agreement/contract of service has been made by the respondent with the petitioner. It is further submitted that the petitioner was again engaged on part time basis for 89 days w.e.f. 11.9.2000 to 8.12.2000 on fixed remuneration of Rs. 2,000/- per month and thereafter w.e.f. 21.12.2000 to 19.3.2000 for 89 days basis. It is admitted that the petitioner had completed 240 days in preceding twelve months financial year but he had not completed 240 days in preceding twelve months in a calendar year. There is no work of electrician helper in Solan Division after 19.3.2001 and S/Shri Rajesh Kumar and Shyam Lal were re-engaged as per order passed by this Court. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties gave rise to the following issues which were struck on 20.6.2013.

12. Whether the termination of the services of the petitioner w.e.f. 20.3.2001 without notice and paying retrenchment compensation and continuance of juniors and fresh appointments is illegal and unjustified as alleged? . . .*OPP.*

13. If issue no.1 is proved in affirmative to what service benefits the petitioner is entitled to? . . .*OPP.*

14. Whether the petitioner is estopped from filing this petition by his own acts, deeds and conduct etc.? . . .*OPR.*

15. Whether this petition is not maintainable as alleged? . . .*OPR*.

16. Relief.

6. Besides having heard the Learned Counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no. 1 | Yes. |
| Issue no. 2 | Entitled to reinstatement with seniority and continuity but without back-wages |
| Issue no. 3 | No. |
| Issue no. 4 | No. |
| Relief. | Reference answered in favour of the petitioner and against the respondent per operative part of award. |

REASONS FOR FINDINGS

***Issue no. 1.***

8. The learned counsel for the petitioner contended that the petitioner was engaged as electrician helper in electric trade for a period of 89 days on 13.6.2000, however, he continued till 31.3.2001 on monthly salary of Rs. 1,000/- which was later on enhanced to Rs. 2,000/- per month. The period of 89 days was extended from time to time after a gap of one or two days till 31.3.2001. Thereafter, the services of the petitioner had been terminated orally without assigning any reason and without the compliance of mandatory provisions of law. He also contended that junior persons to the petitioner have been retained. He further contended that since the petitioner had completed 240 days in preceding twelve calendar months, hence, his termination without assigning any reason is against the provisions of law.

9. On the other hand, Ld. Counsel for the respondent contended that the since the petitioner had been engaged for specific period of 89 days on contract basis and his contract was not extended after 31.3.2001, hence, he is not entitled to any relief.

10. The petitioner while appearing into the witness box as PW-1 has tendered his affidavit Ex. PW-1/A, in examination-in-chief wherein he reiterated almost all the averments as made in the claim petition. He also tendered in evidence the copy of matriculation certificate, Ex. PW-1/B, mark sheet of ITI Ex. PW-1/C, Trade certificate Ex. PW-1/D, experience certificate Ex. PW-1/E, office order Ex. PW-1/F, application Ex. PW-1/G, medical certificate Ex. PW-1/H, mandays chart Ex. PW-1/J and copy of award Ex. PW-1/K. In cross-examination he admitted that he was appointed for 89 days by HRTC on monthly salary of Rs. 1000/-. He further admitted that he was again re-engaged for 89 days w.e.f. 11.9.2000 to 8.12.2000 on monthly salary of Rs. 2,000/-. He denied that he was not orally terminated by the respondent. He also denied that he had not worked upto 31.3.2001.

11. On the other hand, the respondent examined RW-1 Ms. Sunita, Senior Assistant, who deposed that the petitioner had been engaged as apprentice in the respondent department, who completed his apprenticeship in electric trade. The petitioner had been engaged as part time for a period of 89 days on monthly salary of Rs. 1,000/- w.e.f. 9.6.2000 to 5.9.2000, 11.9.2000 to 8.12.2000 and thereafter w.e.f. 21.12.2000 to 19.3.2001 and to this effect agreements Ex. RW-1/A to Ex. RW-1/C had been entered. Ex. RA and Ex. RB are the copies of office order dated 21.8.2000 and 21.12.2000. The petitioner had not completed 240 days in a calendar year and after 19.3.2001, the petitioner had not been reengaged. In cross-examination, she stated that HRTC Solan division falls under HRTC division Shimla. She admitted that the petitioner was appointed as electrician on contract basis as per Ex. RW-1/B. She further admitted that the period of contract was extended thrice for 89 days. She also admitted that the petitioner was engaged on June, 2000 and worked as such till March, 2001. The copy of mandays chart of the petitioner is Ex. PW-1/J. The petitioner has completed continuous 266 days in the preceding twelve months. She admitted that no notice and compensation was issued to the petitioner prior of his termination. She stated that no record was available with her to show that similarly situated person Shri Rajesh Kumar S/o Shri Parmanand was terminated and thereafter re-engaged by the order of this Court as per award Ex. PW-1/K. She had no knowledge that the post of electrician helper was available at the time of termination of the petitioner. She admitted that the seniority of the employees is maintained at divisional level. She has no knowledge that after the year, 2001 many persons were engaged by the respondent. She could not state from the record that Shyam Lal S/o Shri Durga Dass was engaged as electrician on 20.5.2009 and thereafter he died and this post was still available.

12. I have closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that the petitioner was initially engaged as a part time electrician helper for a period of 89 days on monthly salary of Rs. 1,000/- w.e.f. 9.6.2000 to 5.9.2000 vide agreement Ex. RW-1/A. Thereafter, his contract was extended w.e.f. 11.9.2000 to 8.12.2000 for another period of 89 days vide agreement Ex. RW-1/B and finally his contract was extended w.e.f. 21.12.2000 to 19.3.2001 vide agreement Ex. RW-1/C. Therefore, it has become clear that the period of contract was extended twice. It is also not disputed that before his alleged termination/disengagement, the petitioner had not been given any notice or paid retrenchment compensation. The mandays chart, Ex. PW-1/J goes to show that in the preceding twelve calendar months of his alleged termination, the petitioner had completed more than 240 days. This fact has also been admitted by Ms. Sunita, Senior Assistant (RW-1). I***n Haryana State Electronics Development Corporation Limited Vs Mamnl, (2006) 9 SCC 434***. It has been held by the Hon'ble Supreme Court that the appointment for a short period (89 days) and termination of services at the end of the said period and reappointment after a gap of one day, such action of termination and reappointment repeated again and again for a period of about one year and a half year, in such circumstances, the termination was not bonafide but adopted to defeat the object of the Act. Thus it is not covered by section 2(oo) (bb) of the Industrial Disputes Act, 1947.

13. ***Similarly our own Hon'ble High Court in case Shri Manoj Kumar Sharma Vs. HRTC & Another in CWP No. 39 of 06 dated 28.5.2007*** has held that the intention of the management not to engage the respondent workman for a specified period was to defeat the rights of a workman under section 25-F of the Act as in that case also the petitioner was initially appointed for 89 days and after giving him fictional breaks, reappointed for another 89 days followed by one year appointment. The practice has been adopted by the management of HRTC to defeat the provisions of section 25-F of the Industrial Disputes Act, 1947 which amounts to unfair labour practice.

14. In the present case also as observed earlier the petitioner was initially appointed for a period of 89 days w.e.f. 9.6.2000 and after giving him frictional breaks he was reappointed for

another 89 days followed by another re-appointed for 89 days till 17.3.2001. Therefore, it can safely be held that the such action of repeated termination and re-appointment by the respondent was not bonafide but the same was adopted to defeat the object of the Act which amounts to unfair labour practice. Undoubtedly, the respondent has taken a plea that since, the services of the petitioner had been engaged on contract basis as per office orders Ex. RA and Ex. RB, his alleged termination/disengagement does not fall within the definition of retrenchment as given under section 2 (oo) but the same is governed by the exception as given under section 2 (oo) (bb) of the Act but the plea of the respondent does not hold good in view of the law laid down supra. Since, it stands proved, on record, that in the preceding twelve months, before his termination, the petitioner had completed more than 240 days, it was obligatory upon the respondent to have issued him notice and also to pay him retrenchment compensation as per section 25-F of the Act. Since, nothing like such was done, I have no hesitation in holding that the termination/disengagement of the petitioner is in contravention of the provisions of section 25-F of the Act and for this reason, the same is illegal and improper.

15. Another plea which has been taken by the petitioner is to this effect that his juniors and fresh appointments/similar situated persons are continuing with the respondent but to prove this plea no evidence has been led by the petitioner and no record from the office of the respondent was summoned. Even, RW-1 Ms. Sunita has stated in her cross-examination that she could not state that Prem Chand was engaged on 20.5.2009 after the termination of the petitioner and Shyam Lal S/o Shri Durga Dass was engaged as electrician on 20.5.2009. She further stated that she has no knowledge that after the year, 2001, many persons were engaged by the respondent. Thus, keeping in view the entire evidence on record, I hold that the petitioner has failed to prove on record that his juniors and fresh appointments/similar situated persons are continuing with the respondent. Accordingly, issue no.1 is partly decided in favour of petitioner and against the respondent.

***Issue no. 2.***

16. Since I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

17. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

18. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

"16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

19. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. There is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Even, in his examination-in-chief he has not asserted even a single word that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue no. 3.***

20. To prove this issue, no specific evidence has been led by the respondent in order to show that the petitioner is estopped from filing this petition by his own acts, deeds and conduct etc. Moreover, the petitioner has filed the present claim petition pursuant to the reference sent by the appropriate government to this Court for adjudication. Accordingly, this issue is answered in favour of the petitioner and against the respondent.

***Issue no. 4.***

21. In support of this issue, no evidence has been led by the respondent. Moreover, I find nothing wrong with this petition which is perfectly maintainable. Accordingly, issue no.4 is decided in favour of petitioner and against the respondent.

***Relief***

As a sequel to my above discussion and findings on issue no.1 to 4, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 30th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, (H.P).**

| | | |
|---|---|---|
| Ref. No. | : | 6 of 2011. |
| Instituted on. | : | 1.4.2011. |
| Decided on | : | 30.11.2015. |

Prem Singh S/o late Shri Barfu Ram R/o Village Langehad, P.O Giyun, Tehsil Dharampur, District Mandi, HP. . . .*Petitioner*..

*Vs.*

M/s Concept Cartonz, Hil Top Estate, Village Bhatoli Kalan, Jharmajri, Baddi, District Solan, HP through its Managing Director. . . .*Respondent.*

*Reference under Section 10 of the Industrial Disputes Act, 1947*.

**For petitioner** : Shri R.K Khidtta, Advocate.

**For respondent :** Shri Rupesh Sharma, Advocate.

AWARD

The following reference has been sent by the appropriate government for adjudication:

**"Whether verbal termination of the services of Shri Prem Singh S/o late Shri Barfu Ram, Graphic Designer by the management of M/s Concept Cartonz, Hil Top Estate, Village Bhatoli Kalan, Jharmajri, Baddi, District Solan, HP w.e.f. 24.8.2009 without serving any chargesheet, without conducting enquiry and without following the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, to what back wages, service benefits and relief the above named workman is entitled to from concerned management?"**

2. In nutshell, the case of the petitioner is that he was engaged as Graphic Designer by the respondent company in the month of September, 2007 and worked as such till 24.8.2009 continuously. It is further stated that w.e.f. 24.8.2009, the services of the petitioner had been terminated illegally without complying with the provisions of section 25-F, 25-N, 25-G and 25-H of the Industrial Disputes Act, 1947 (hereinafter referred to as Act). It is also stated that the work and conduct of the petitioner remained up to the satisfaction of the official of the respondent, who had completed 240 days in each calendar year and his services were terminated without assigning any reason. Juniors to the petitioner are still working with the respondent company. The work which the petitioner had been performing since the year, 2007, is still available with the respondent company and the termination of the services of the petitioner in the aforesaid manner tantamount to unfair labour practice. It is also stated that the petitioner is a workman as defined in the Act as he used to work manually with the respondent. Against this back-drop a prayer for re-instatement along-with all consequential benefits including back-wages has been made. It is also prayed that the respondent company may be directed to pay Rs. 50,000/- as damages and litigation cost amounting to Rs. 11,000/-.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, that the petitioner had not come to this Court with clean hands and that the petitioner had been working in supervisory capacity and his designation was of officer. On merits, it has been asserted that the petitioner joined the company on 20.12.2007 but left the company without any intimation in Jan., 2008 and on 18.3.2008, he again came to the factory and requested to keep him on the rolls of the company and as such the respondent on his written apology, appointed him afresh on 18.3.2008 and worked till 19.8.2009. It is further submitted that the petitioner was working as officer in supervisory capacity and when two

officers quarreled with each other and in order to maintain discipline, both were terminated after calling their written apology. The real facts of the case are that the petitioner had quarreled with his co-officer Mr. Manish Kumar on 19.8.2009 and in order to maintain discipline, the respondent reported the matter to the Police against both of them and when they showed adamancy in working in healthy atmosphere in that event both of them were terminated while giving them their full & final dues. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. Pleadings of the parties give rise to the following issues which were struck on 22.6.2013.

1. Whether the verbal termination of services of the petitioner by the respondent w.e.f. 24.8.2009 without following the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as alleged? . . .*OPP.*

2. If issue no.1 is proved in affirmative to what service benefits the petitioner is entitled to? . . .*OPP.*

3. Whether the provisions of the Industrial Disputes Act are not attracted in the case of the petitioner as alleged? . . .*OPR.*

4. Whether this petition is not maintainable as alleged? . . .*OPR.*

5. Relief.

6. Besides having heard the learned counsel for the parties, I have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

| | |
|---|---|
| Issue no. 1 | Yes. |
| Issue no. 2 | Entitled to reinstatement with seniority and continuity but without back-wages. |
| Issue no. 3 | No. |
| Issue no. 4 | No. |
| Relief. | Reference answered in favour of the and against the per operative part of award. |

REASONS FOR FINDINGS

***Issues no.1 & 3.***

8. Being interlinked and correlated both these issues are taken up for discussion and decision.

9. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act and even juniors to him are still working with the respondent. He further contended that before terminating the services of the petitioner neither any enquiry was conducted against him nor he was afforded any opportunity of being heard.

10. On the other hand, Ld. Counsel for the respondent contended that the petitioner was not a workman as he was working as officer in supervisory capacity. He further contended that when two officers quarreled with each other both of them were called upon to file written apology for the same and finally both of them were terminated while giving them full & final dues and as such the termination of the petitioner is not illegal.

11. The petitioner stepped into the witness box as PW-1 to depose that he had been engaged as Graphic Designer in the month of September, 2007 by the respondent company and worked continuously till 24.8.2009, when his services had been terminated without issuing any show cause notice and without complying with the mandatory provisions of the Act. His services had been terminated without serving any notice, chargesheet and without holding any domestic enquiry. No compensation had been paid to him and he had worked for more than 240 days in a calendar year. His juniors namely Brahm Dutt and others are still working in the company. Since, the date of his termination, he is unemployed. The company officials used to take his signatures on blank papers. He had not abandoned his job. He is a workman and used to work manually. In the cross examination, he denied that he himself had left the company without intimation. He admitted that on 18.3.2008, he went to the company with the request for his re-engagement. He denied that apology letter had been given by him. He further denied that he was terminated by the respondent after paying him all his dues. He is still ready to work with the company.

12. On the contrary, the respondent examined one Shri Surender Rattan Sharma, as RW-1, who tendered his affidavit Ex. RW-1/A in examination-in-chief wherein he reiterated almost all the averments as made in the reply. He also tendered, in evidence, copy of authority letter Ex. RW-1/B and copy of letter dated 19.8.2009, Ex. RW-1/C. In cross-examination, he admitted that the petitioner was engaged as Graphic Designer to design the medicine boxes and the work of design was being carried by him manually. He denied that the petitioner joined as graphic designer in the company since, September, 2007. He admitted that the petitioner worked continuously till 19.8.2009. He also stated that the petitioner voluntarily left in the month of Jan., 2008 and again joined in the month of March, 2008. He denied that the petitioner had given the leave as his father remained ill. He admitted that the petitioner worked continuously and completed 240 working days in each calendar year. He further admitted that no FIR was lodged against the petitioner in the Police station. He also admitted that neither any prior notice had been issued to the petitioner before terminating his services nor compensation had been paid to him. He admitted that payment of Rs. 22,258/- had been made to the petitioner as salary for the months of August & September, 2009. He admitted that new person was engaged on the post of the petitioner and the petitioner was not called for appointment when new person was engaged. He also admitted that neither any show cause notice was issued nor enquiry was got conducted against the petitioner for quarreling with Mr. Manish Verma. He denied that the petitioner was not working in supervisory capacity. He admitted that in case any workman creates indiscipline or commit misconduct in the company, it is mandatory to conduct the enquiry against the workman and only thereafter, his services could be terminated.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that the petitioner had worked with the respondent as Graphic Designer. The case of the petitioner is that he was engaged as Graphic Designer w.e.f. September,

2007 but he has failed to produce on record any such document/record which could go to show that he was engaged in the month of September, 2007. Neither any wages register/attendance register had been summoned by the petitioner to show that he had worked with the respondent w.e.f. September, 2007. On the other hand, RW-1 Shri Surender Rattan Sharma has categorically stated that the petitioner had joined the company on 20.12.2007. Hence, in the absence of any record, I have no hesitation in holding that the petitioner joined the respondent company on 20.12.2007.

14. The first plea which has been taken by the respondent is to this effect that the petitioner was working as officer in the supervisory capacity and was drawing more than Rs. 10,000/- per month and as such the petitioner does not fall under the category of workman as prescribed in section 2 (s) of the Act. Now, this Court is required to ascertain as to whether the petitioner falls within the category of workman or not as per section 2 (s) of the Act. At this juncture, it would be relevant to re-produce section 2 (s) of the Act, which reads as under:

> "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, dischasrge or retrenchment has led to that dispute, but does not include any such person:
>
> (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
>
> (ii) who is employed in the police service or as an officer or other employee of a prison; or
>
> (iii) who is employed mainly in a managerial or administrative capacity; or
>
> (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

15. It is a settled provision of law that in determining as to whether a person is a workman or not, the Court has to principally see the main or substantial work for which he was employed. Neither the designation nor any incidental work done by him will get him out-side the preview of the Act. The Hon'ble Supreme Court **in (1994) 5 S.C.C 737, titled as H.R Adyanthaya and others Vs. Sandoz (India) Ltd., and another** has held that for an employee to be covered by the definition of workman he must be employed in any industry to do any manual, un-skilled, skilled, technical, operational, clerical or supervisory work. If he falls within these categories, it has then to be seen whether he comes within any of the four excluded categories mentioned in section 2 (s) of the Act. The relevant portion of the aforesaid judgment reads as under:

> **24……. Hence, the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions of the definition. We reiterate the said interpretation."**

16. In the instant case, from the perusal of evidence on record, it has become clear that the petitioner was engaged as Graphic Designer by the respondent. It has been admitted by RW-1 that

the work of the graphic designer was to design the medicine boxes and this work was being carried out by the petitioner manually. The respondent has failed to prove that the petitioner was employed in a managerial or administrative capacity or by the reason of power vested under him, the functions of the petitioner were mainly of a managerial nature. Since, the duties of the petitioner were of technical nature and he was not performing any supervisory or managerial function, hence, in such circumstances, it cannot be said that the petitioner was not a workman.

17. Another plea which has been taken by the respondent is that since the petitioner had quarreled with one Shri Manish Verma, hence, on the basis of indiscipline, his services were terminated vide Ex. RW-1/C. It has been admitted by RW-1 Shri Surender Rattan Sharma in his cross-examination that no FIR was lodged against the petitioner in Police Station. He further admitted that in case any workman creates indiscipline or commit misconduct in the company, it is mandatory to conduct the enquiry against the workman and only thereafter his services could be terminated. In the instant case, admittedly no enquiry had been conducted against the petitioner. Since, the petitioner had been in continuous service of the respondent w.e.f. December, 2007, his services could not have been terminated as per letter dated 19.8.2009, copy of which is Ex. RW-1/C, on the plea of misconduct. It is settled legal proposition that a workman, against whom misconduct is alleged, cannot be dismissed or discharged unless a proper domestic enquiry is held against him in respect of the alleged misconduct. Even, if the alleged misconduct is proved against the workman, he cannot be dis-charged or dismissed from service unless he has been afforded reasonable opportunity of being heard before initiating any action against him by the employer/respondent. In **D. K Yadav Vs. M/s J.M A Industries Ltd. as reported in 1993-1 Supreme Court Service Law Judgments -221**, the Hon'ble Apex Court has held as under:

> *"Reasonable opportunity be given to the employee concerned to put forth his case and proper enquiry be held before terminating his service."*

In the instant case, admittedly, the petitioner was never asked to answer any charges as no chargesheet was issued to him and no enquiry was held before terminating his service, on the basis of alleged misconduct. Therefore, the termination order dated 19.8.2009, without conducting any enquiry and without affording reasonable opportunity of being heard to the petitioner is in utter violation of the principles of natural justice.

18. Admittedly, the petitioner had completed more than 240 days in each calendar year, preceding his termination. It has also been admitted by RW-1 Shir Surender Rattan Sharma in his cross-examination that the petitioner had worked continuously and completed 240 working days in each calendar year. He further admitted that neither any prior notice had been issued to the petitioner before terminating his services nor compensation had been paid to him. He also admitted that new person was engaged on the post of the petitioner and he (petitioner) was not called for appointment when new person was engaged. Since, the petitioner had completed 240 working days in twelve calendar months preceding his termination and that the respondent had engaged new person in his place, without giving any opportunity of being heard to the petitioner, it was obligatory upon the respondent to have complied with the provisions of section 25-F, 25-G and 25-H of the Act before terminating his services but the respondent has failed to comply with the provisions of the aforesaid sections.

19. Therefore, In view of my foregoing observations, I have no hesitation in holding that the termination/disengagement of the services of the petitioner by the respondent without holding enquiry and without complying with the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as such the termination order Ex. RW-1/C is set aside and quashed. Hence, both these issues are decided accordingly.

**Issue no. 2.**

20. Since I have held under issues no.1 & 3 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

21. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

22. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

23. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no cogent evidence on record led by the petitioner that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

***Issue No. 4.***

24. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

***Relief.***

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is ordered to be answered in favour of the petitioner and against the

respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 30th Day of November 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

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**Ref. 37 of 2015**

**Sh Sanjay Kumar V/s Secy. Bhojia Dental College, Baddi.**

30.11.2015

Present:- None.
It is 10.30 AM but none appeared for petitioner as well as respondent. Be awaited.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge*
*Labour Court, Shimla.*

**Case Called again**
Present:- None.

It is 12:15 PM. Case called twice but none appeared on behalf of the petitioner as well as respondent. Be called after lunch.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge*
*Labour Court, Shimla.*

**Case called after lunch**
30-12-2015.
Present: None.

**Today, the case is fixed for settlement but neither the petitioner nor his authorized representative has appeared before this Court. As per the reference, received from the appropriate government, the case of the petitioner is that he was illegally terminated by the respondent without complying with the provisions of the Industrial Disputes Act, 1947. On the previous date of hearing, Shri A.K. Sharma, AR for the petitioner has appeared and stated that the matter has been settled with the respondent and the case was fixed for placing on record the settlement. However, today none has appeared on behalf of the petitioner before this Court. Moreover, the petitioner has failed to lead any evidence before this Court. Moreever, the petitioner has failed to lead any evidence before this Court in support of his claim petition, in order to show that his services have been illegally terminated by the respondent without complying with the provisions of the Insustrial Disputes Act, 1947. Hence,**

**in the absence of any evidence on record, the claim of the petitioner fails and is hereby dismissed and as such the reference is answered against the petitioner. Let a copy of this order/award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.**

Announced:
30-11-2015

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge*
*Labour Court, Shimla.*

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**IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT, SHIMLA.**

Ref. no. : 80 of 2014.
Instituted on : 27.12.2014.
Decided on : 30.11.2015.

Sunil Kumar Mehta S/o late Shri K.K Mehta R/o RZ 114, Lokesh Park, Najafgarh, South West New Delhi. . . .*Petitioner.*

*VS.*

M/s Cyper Pharma, Village Gullarwala, Sai Road Baddi District Solan, HP through its Managing Director. . . .*Respondent*.

*Reference under section 10 of the Industrial Disputes Act, 1947.*

For petitioner : Shri R.K Khidtta, Advocate.
For respondent : Already ex-parte.

AWARD

The reference, for adjudication, is as under:

***"Whether termination of services of Shri Sunil Kumar Mehta R/o RZ 114, Lokesh Park Near New DTC Terminal, Najafgarh New Delhi-110043 Local address C/o Colonel Bhagat Ram Village Swaraj (Labana) near Sakuntla Guest House, Sai Road Baddi, District Solan, HP w.e.f. 12.6.2013 by the employer/Managing Director M/s Cyper Pharma, Village Gullarwala, Sasi Road Baddi, District Solan, HP without complying with the provisions of the Industrial Disputes Act, 1947 as alleged by the worker is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"***

2. By filing claim petition, the petitioner challenged his termination to be illegal on the ground that he was engaged as Analytical Chemist (Q.C) Manager w.e.f. 1.12.2011 on monthly salary of Rs. 40,000/- and worked as such till 11.6.2013. The work and conduct of the petitioner always remained upto the mark of the concerned official. On 12.6.2013, the services of the petitioner had been terminated without following the mandatory provisions of the Industrial

Disputes Act, 1947 (hereinafter referred to as Act) as neither any notice nor retrenchment compensation had been paid to the petitioner. It is further stated that the petitioner is a workman as defined under the provisions of the Act as he used to work manually with the respondent company. The salary for the month of May, 2013 and twelve days of the June, 2013 have not been paid to the petitioner which comes to Rs. 52365/- and the company is bound to pay the salary of the petitioner for the aforesaid period with interest. The petitioner visited the office of the respondent number of times for his reengagement but of no avail. The termination of the services of the petitioner is totally illegal as the company has not followed the mandatory provisions of sections 25-F, 25-G, 25-H and 25-N of the Act. Even, no warning or chargesheet was ever served to the petitioner. The petitioner had completed 240 days in each calendar year and junior to him are still working with the company. The work which the petitioner was performing with the company is still available and the petitioner is unemployed w.e.f. 12.6.2013. Against this back-drop a prayer for his reinstatement with all consequential service benefits including full back-wages along-with wages for the month of May, 2013 and 12 days of the June, 2013 which comes to Rs. 52,365/- with interest @ 12% per annum along-with costs.

3. Since, the respondent had refused to accept the notice issued by this Court, hence, vide order dated 9.9.2015, it had been proceeded against ex-parte.

4. Thereafter, the petitioner led exparte evidence. The petitioner himself appeared into the witness as PW-1 and tendered his affidavit Ex. PW-1/A in evidence wherein he reiterated almost all the facts as narrated in the claim petition. He also tendered, in evidence, the notices of Labour Inspector, Ex. PW-1/B and Ex. PW-1/C, copy of demand notice Ex. PW-1/D, copies of test request form finished product, Ex. PW-1/E and Ex. PW-1/F and copy of Bank Account Sheet Ex. PW-1/G.

5. I have heard the Learned Counsel for the petitioner and also gone through the record of the case carefully.

6. Since, the evidence led by the petitioner remained un-rebutted as the respondent did not appear to contest this testimony of the petitioner, his evidence is sufficient to prove that he was engaged as Analytical Chemist (Q.C) by the respondent company *w.e.f.* 1.12.2011 and had worked till 11.6.2013. The services of the petitioner have been terminated by the respondent *w.e.f.* 12.6.2013. He had worked for 240 days in the preceding calendar year under the respondent. So, prior to his termination, the respondent was under the legal obligation to comply with the provisions of the section 25-F of the Industrial Disputes Act. But, no such compliance was made by the respondent, hence, there is violation of section 25-F of the Act, on the part of respondent. As a result, the termination of petitioner is not sustainable under the eyes of law and is hereby set aside. Hence, the petitioner is held entitled for reinstatement in service with seniority and continuity.

7. It has also been stated by the petitioner that his salary for the month of May, 2013 and twelve days of June, 2013 have not been paid by the respondent. However, to prove this fact, no satisfactory evidence has been led by the petitioner. The petitioner has only placed on record the photocopy of Bank account sheet Ex. PW-1/G. However, this document is not sufficient to establish the fact that he was not paid the salary for the month of May, 2013 and twelve days of June, 2013. Therefore, in the absence of any satisfactory evidence on record, it cannot be said that the petitioner was not paid the salary for the month of May, 2013 and twelve days of June, 2013.

8. Now, the next question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim**

**Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

9. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

10. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald assertion of the petitioner, there is no evidence on record led by him that he was not gainfully employed after his disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages.

11. In the light of my aforesaid observation, the claim of the petitioner is allowed and the reference is answered accordingly to the effect that the petitioner is ordered to be reinstated in service with seniority and continuity but without back wages. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open court today this day of 30th November, 2015.

Sd/-
(SUSHIL KUKREJA)
*Presiding Judge,*
*Industrial Tribunal-cum-*
*Labour Court, Shimla.*

**In the Court of Shri Gian Sagar Negi, Sub-Divisional Magistrate, Shimla (R), District Shimla (H. P.)**

Shri Bhim Parkash s/o Shri Dhani Ram Sharma, r/o Village Dargot (Kajalari), P.O. Nehra, Tehsil & District Shimla, Himachal Pradesh.

*Versus*

General Public .. *Respondent.*

Whereas Shri Bhim Parkash s/o Shri Dhani Ram Sharma, r/o Village Dargot (Kajalari), P.O. Nehra, Tehsil & District Shimla, Himachal Pradesh has filed an application along with affidavit in the court of undersigned under Section 13(3) of the Births & Deaths Registration Act, 1969 to enter the date of birth of his son named—Mr. Ramesh Sharma s/o Shri Bhim Parkash s/o Shri Dhani Ram Sharma, r/o Village Dargot (Kajalari), P.O. Nehra, Tehsil & District Shimla, Himachal Pradesh in the record of Secy., Birth and Death, Gram Panchayat Ganewag, Shimla.

| Sl. No. | Name of the family members | Relation | Date of birth |
|---|---|---|---|
| 1. | Mr. Ramesh Sharma | Son | 15-08-1991 |

Hence, this proclamation is issued to the general public if they have any objection/claim regarding entry of the name & date of birth of above named in the record of Gram Panchayat Ganewag (Nehra) may file their claims/objections on or before one month of publication of this notice in Govt. Gazette in this court, failing which necessary orders will be passed.

Issued today 20-11-2015 under my signature and seal of the court.

Seal. Sd/-

*Sub-Divisional Magistrate,*
*Shimla (R), District Shimla.*

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**CHANGE OF NAME**

I, Neelam Sharma w/o Shri Raj Kumar, r/o Village Dangoli, Tehsil & District Una (H. P.) has changed my name from Neelam Sharma to Harsha Sharma. All concerned may note please.

HARSHA SHARMA,
w/o Shri Raj Kumar,
r/o Village Dangoli,
Tehsil & District Una (H. P.)

## आबकारी एवं कराधान विभाग

आदेश

शिमला–2, 8 जनवरी, 2016

**संख्याः ईएक्सएन–एफ(16)–3 / 99–वौल्यूम–**I.—हिमाचल प्रदेश के राज्यपाल, हिमाचल प्रदेश मनोरंजन–कर (चलचित्र प्रदर्शन) अधिनियम, 1968 (1968 का अधिनियम संख्यांक 11) की धारा 6 की उप–धारा (2) के साथ पठित हिमाचल प्रदेश मनोरंजन शुल्क अधिनियम, 1968 (1968 का अधिनियम संख्यांक 12) की धारा 12 की उप–धारा (3) के अधीन उनमें निहित शक्तियों का प्रयोग करते हुए डिफ, धर्मशाला अंतर्राष्ट्रीय फिल्म महोत्सव को 05.11.2015 से 08–11–2015 तक धर्मशाला में फिल्म महोत्सव के आयोजन हेतु पूर्वोक्त अधिनियमों के अधीन मनोरंजन शुल्क और मनोरंजन कर के संदाय से छूट प्रदान करने के एतद् द्वारा आदेश देते हैं।

आदेश द्वारा,
हस्ताक्षरित / –
अति0 मुख्य सचिव (आबकारी एवं कराधान)।

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[*Authoritative English text of this Department Notification No. EXN-F(16)-3/99-Vol.-I dated 08-01-2016 required under clause (3) of article 348 of the Constitution of India.*]

## EXCISE AND TAXATION DEPARTMENT

## ORDER

*Shimla-171002, the 8th January,* 2016

**No. EXN-F(16)-3/99-Vol.-I.—**In exercise of the powers vested in him under sub-section(3) of section 12 of the Himachal Pradesh Entertainments Duty Act, 1968(Act No. 12 of 1968) read with sub-section (2) of section 6 of the Himachal Pradesh Entertainments Tax(Cinematograph Shows) Act,1968 (Act No.11 of 1968), the Governor, Himachal Pradesh hereby order to exempt diff, Dharamshala International Film Festival from the payment of entertainment duty and entertainment tax under the aforesaid Acts for the organization of film festival at Dharamsala *w.e.f* 05.11.2015 to 08.11.2015.

By order,
Sd/-
*Addl. Chief Secretary (E&T)*

नियन्त्रक, मुद्रण तथा लेखन सामग्री, हिमाचल प्रदेश, शिमला–5 द्वारा मुद्रित तथा प्रकाशित
इलेक्ट्रॉनिक हस्ताक्षरित राजपत्र, वैबसाइट http://rajpatrahimachal.nic.in पर उपलब्ध है एवम् ऑनलाइन सत्यापित किया जा सकता है